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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 597

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED SHOE MACHINERY CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

FILED SEPTEMBER 8, 1967
PROBABLE JURISDICTION NOTED DECEMBER 4, 1967

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* Witnesses subpoenaed by the defendant during the closing days of the trial were requested to submit additional information to the parties. This material submitted after trial was stipulated in Stipulation No. 7, subsequently received in evidence as part of the record (Hearing of January 24, 1967, Tr. 11-12). The revenue tables as revised to include changes required by the stipulated material were appended as a part of the Government's Post-Trial Brief in accordance with the court's suggestion and after inspection by counsel.

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UNITED STATES *v.* UNITED SHOE MACHINERY CORPORATION

DECREE OF THE COURT

As Modified—July 12, 1954.

Amendments have been made only in Paragraphs 1, 6, 6(h), 6(i), 6(j), 7, 12, 13, 14, and 20.

This cause having come on to be heard, and the Court having fully considered the evidence and arguments, and having filed its Findings of Fact, and Opinions on Violation and Remedy, it is hereby

Ordered, Adjudged, and Decreed that:

1. As used in this Decree:

"A Day" means January 1, 1955.

"B Day" means April 1, 1955.

"C Day" means January 1, 1965.

"Shoe Machinery" means all types of shoe machinery distributed to shoe factories for use in the manufacture or repair of footwear, except dry thread sewing machines.

The words "machine type," "machines" and "machine" as used in this Decree mean "shoe machinery" as defined herein.

The word "supplies" as used in this Decree means all products, when distributed by defendant for use or consumption by shoe factories, of the types heretofore classified by the defendant as sales merchandise.

The word "patent" as used in this Decree means a United States patent for an invention relating to the manufacture, use or sale of footwear, shoe machinery or supplies.

2. Defendant violated Sec. 2 of the Sherman Act, 15 U.S.C. Sec. 2, by monopolizing the shoe machinery trade and commerce among the several States. Defendant violated the same section of the law by monopolizing that part of the interstate trade and commerce in tacks, nails, and eyelets, which is concerned with supplying the demand for those products by shoe factories within the United States. The other charges of violation of the Sherman Act set forth in the complaint are dismissed

with prejudice. No obligation of the defendant under this decree shall apply to its manufacturing, distribution, service, patent or other activities in any industry other than shoe machinery and supplies or in relation to any industry other than the shoe manufacturing industry.

3. Defendant, its subsidiaries, and each of their directors, officers, agents, and employees, and, all persons acting for them are hereby enjoined and restrained from further monopolizing those parts of the trade or commerce among the several States which have been referred to in the previous paragraphs.

4. All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market.

5. After A Day, defendant shall not offer for lease any machine type, unless it also offers such type for sale. Defendant, if it offers any machine type for lease, shall set such terms for leasing that machine as do not make it substantially more advantageous for a shoe factory to lease rather than to buy a machine. Defendant shall not be required to secure advance judicial approval of the financial terms in sales or lease contracts. But if any lease or contract substantially discriminates in favor of leasing, plaintiff may apply to this Court for further specific relief.

6. Before A Day, defendant, if it desires to continue to lease any shoe machinery, shall file in this Court a standard form of lease that meets the following directions. Other standard forms of lease shall be filed in this Court by defendant promptly as they are printed and before defendant places them in use.

a. The maximum term for either an original or renewal lease shall be five years.

b. Provision shall be made that a lessee shall have the right to return the leased machine at any time after one year, on paying all rentals already accrued, the shipping charges, the cost of broken and missing parts, and in addition, no more than the equivalent of the monthly

(not the unit) payments which would have been due had the lessee kept the machine for an additional three months. The lease may provide for return on terms more favorable to the lessee if the return is due exclusively to defects in the machine, or customer dissatisfaction after a trial period, or customer abandonment of operations. But no return charge shall discriminate on account of the substitution of a competitive machine.

c. The new forms of lease shall not include any return or deferred payment charges other than those specified in the previous paragraph. But they may include provisions for initial charges and deposits.

d. Defendant may, if it sees fit, use a unit charge in addition to, or as an alternative to, monthly rental charges. But such unit charges shall have no minimum.

e. After A Day, defendant shall not include within any lease, whether unit charges are used or not, a full capacity clause, or any equivalent.

f. After A Day, defendant shall not include either in the terms of, or the application of, any lease any plan similar to the right of deduction fund which it has heretofore established, or the 1935 Plan which it adopted for lessees desiring to return machinery.

g. Defendant shall not be obliged to present to the Court a statement of what will be the amount of, or method of calculating, its rentals, its charges, deposits, or like financial terms. But, after A Day, in preparing, executing, or applying its leases, defendants shall not discriminate between customers of the same general class, except that defendant may make different deposit provisions for different persons, upon an individual basis.

h. Defendant may propose various uniform lease riders to provide for peak-load or trial installations. Defendant may also use various loan forms to cover installation of experimental or other machines for which commercial terms have not been adopted. All such riders and forms shall comply with the preceding paragraphs.

i. Each lease shall expressly state what services and privileges it covers. After A Day, defendant may render, without separate charges, instruction services, installation services, repair services, or other services, during a

period of 30 days, exclusive of Saturdays, Sundays and holidays, after the machine has been first installed and set up in line for use in shoe manufacture. After such 30-day period defendant shall not provide any such services for a machine covered by a lease, except during the first 60 days, exclusive of Saturdays, Sundays and holidays, of a trial installation period covered by a lease trial rider as above provided, other than upon the basis of separate and reasonable charges for the services rendered, and the permission to render service for machines covered by lease trial riders herein contained shall be subject to the condition that similar service is made available for trial installations of machines whether to be leased or to be sold.

j. Defendant shall not vary the substance of the forms of lease submitted to the Court, without the Court's approval, but defendant may, without submitting them to the Court, use such special forms of lease or loan agreements as may be appropriate to the requirements of Federal, State or local governmental agencies and of educational institutions not engaged in the manufacture of footwear for profit. This provision shall not be interpreted as requiring defendant to secure advance judicial approval of the dollars and cents figures used in setting monthly rental charges, unit charges, deposits, or other specifically fiscal aspects of the lease.

7. Except for good cause, defendant shall not after A Day refuse a prospective customer's request to lease or buy a machine, of a type which defendant is at the time of such request offering for commercial lease or sale. In the event that a prospective customer is refused the privilege of buying or leasing a machine, he shall have the right to intervene in this case in this Court to have his controversy adjudicated, and in such proceedings, defendant shall have the burden of proving that there is good cause for refusing to make the sale or lease.

8. Before A Day, defendant shall present to the Court, if it desires to continue to render repair and other services, a tariff of the charges which it proposes to apply for rendering service. This service tariff shall have uniform charges for leased and sold machines. It may take

into account travel time as well as time used in making repairs or rendering other services. It may recognize any economy defendant actually realizes in its business on a quantity basis, or any other economies in servicing customers of a particular type, or customers who commit themselves for particular periods of time, in any event, however, not exceeding twelve months at a time. Neither the tariff nor this Decree shall be interpreted as requiring defendant to render services in connection with machines, or parts, not of its manufacture. The tariff shall provide that parts shall be made available on the same terms to customers receiving services, customers not receiving services, and any other person; provided, however, that defendant shall not be obliged to furnish parts to a customer to help him construct an entire new machine out of assembled parts.

9. Before B Day, defendant, after conferring with plaintiff, with representatives of The National Shoe Manufacturers Association, and with any lessees who previous to B Day have intervened in these proceedings, shall present to the Court a detailed plan for terminating all outstanding leases. This plan shall make appropriate non-discriminatory financial provisions for defendant's rights and each lessee's rights in connection with the termination of existing leases. It shall also make non-discriminatory provisions under which, within a reasonable period of time, lessees under leases existing before B Day may buy or lease those machines which have been installed. Such provisions shall be at least as favorable to shoe factories as the provisions in the new lease and sale forms.

10. Before B Day, defendant shall submit a plan for disposing of such parts of its business and the business of its subsidiaries as are concerned with the manufacture or distribution of tacks, nails, and eyelets.

11. Beginning three years after A Day, defendant shall not distribute any supplies not manufactured by itself or a corporation in which it owns at least 20% of the Common Stock, provided that this shall not apply to supplies acquired by United before then.

12. Defendant shall grant to any applicant, except a deliberate infringer, a non-exclusive license under any or

all patents now held by defendant on reasonable non-discriminatory royalty terms. Such licenses may, however, be limited to the manufacture, use, and sale of shoe machinery, shoe supplies, and like products used in shoe factories. Such licenses may contain a provision for the inspection of the records of the licensee by an independent auditor who shall report to the licensor only the amount of royalty due and payable and no other information. Such licenses shall contain a provision for imparting in writing, at a reasonable charge by the licensor to the licensee, the methods and processes used by defendant as of the date of this Decree in its commercial practices under the patents licensed. This Court reserves jurisdiction to pass upon the reasonableness of any royalty or charge herein directed to be reasonable. Nothing in this paragraph applies to patents issued upon the basis of applications filed later than A Day, nor shall anything herein prohibit defendant from making a bona fide sale or assignment from time to time of any patent held by it.

13. After A Day, defendant shall not acquire any patent or patent application except patents or patent applications acquired by reason of bona fide employment of the inventor by it or by a subsidiary unless defendant files in this Court an agreement to license that patent or patent application as provided in the previous paragraph with respect to patents it now owns.

14. After A Day, defendant shall not acquire any exclusive license under any patent or patent application unless such exclusive license grants defendant the right to license others and defendant promptly files in this Court an agreement to license as provided in Paragraph 12 of this Decree.

15. After A Day, defendant shall not acquire any shoe machinery business, any business manufacturing or distributing supplies for shoe factories, or any part thereof, or any stock therein, if the transaction involves more than $10,000 or its equivalent.

16. After A Day, defendant shall not buy or acquire any second hand shoe machinery manufactured by it or any other person except for experimental or like purposes. The total acquisitions under this paragraph in any

one year shall not represent an expenditure of more than $25,000, or its equivalent. Nothing in this paragraph shall be construed to apply to such rights as defendant may have to repossess, or to acquire at public auction, machines which it has conditionally sold and which the purchaser has lost the right to retain.

17. After A Day, defendant shall not continue any plan for quantity discounts in connection with any of its supplies, unless such discount system complies with all applicable laws.

18. On C Day, both parties shall report to this Court the effect of this Decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market.

19. Defendant shall pay the costs of this case.

20. On or before October 1, 1954, defendant shall send to each of its then lessees a written copy of this Decree as modified prior to the date of mailing.

21. Nothing in this Decree shall impose any obligation on defendant until three months before A Day.

22. Nothing in this Decree shall impose any obligation on defendant or its subsidiaries to do or omit any action outside the United States.

23. Jurisdiction of this cause is retained for the purpose of enabling either of the parties to apply to this Court at any time for such further orders and directions as may be appropriate for the correction, construction, or carrying out of this Decree, and to set aside the Decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act.

DATE	PROCEEDINGS
12/29/64	Petition of United Shoe Machinery Corporation for Amendment of Decree with . . . Affidavits . . . filed.
12/31/64	Pltf's Petition for Modification of Final Decree filed.
9/27/65	Stipulation No. 1 filed.
5/25/66	Stipulation No. 3 filed.
9/16/66	Stipulation No. 4 filed.
10/28/66	Transcript of Oct. 27, 1966 filed.
11/ 4/66	Stipulation No. 6 offered.
4/11/67	Opinion filed.
4/11/67	Order entered.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 7198

UNITED STATES OF AMERICA, PLAINTIFF

v,

UNITED SHOE MACHINERY CORPORATION, DEFENDANT

PETITION FOR MODIFICATION OF FINAL DECREE

The plaintiff, United States, acting by its duly authorized attorneys, states:

1. On February 18, 1953, this Court entered a Final Decree in the above-entitled action, which Final Decree was amended on July 12, 1954 and September 17, 1954.

2. Paragraph 18 of said Final Decree, as amended, provides:

> 18. On C Day [January 1, 1965], both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market.

3. Pursuant to the requirements of Paragraph 18, above, the plaintiff did, on or before January 1, 1965, report to the Court the effect of the Court's Decree.

4. Plaintiff further obtained, and incorporated in said report, such facts as show the present structure of the shoe machinery market and defendant's power within that market.

5. On the basis of the attached affidavit, the aforesaid report and the aforesaid facts, plaintiff moves the Court:

(1) To find that the Court's Final Decree has not been effective in establishing workable competition in the shoe machinery market.

(2) To find that the defendant, United Shoe Machinery Corporation, still has and exercises monopoly power in the shoe machinery market.

(3) To require the defendant, United Shoe Machinery Corporation, to submit to the Court a plan, pursuant to which the defendant shall establish an independent, full-line shoe machinery manufacturing company capable of competing with the defendant in the shoe machinery market.

(4) To hold such hearings regarding said plan as shall be necessary to assure that said plan is feasible and equitable, does not result in a forfeiture to defendant's stockholders, and promises a fair chance of said new company being able to survive and compete with defendant in the shoe machinery market.

(5) For such other and further relief as may be necessary to establish workable competition in the shoe machinery market.

Dated: December 31, 1964

/s/ ALFRED KARSTED

/s/ W. RANDOLPH ELLIOTT
Attorneys, Department of Justice

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 7198

UNITED STATES OF AMERICA, PLAINTIFF

—against—

UNITED SHOE MACHINERY CORPORATION, DEFENDANT

PETITION OF UNITED SHOE MACHINERY CORPORATION FOR AMENDMENT OF DECREE

Upon the final decree filed February 18, 1953 as modified by orders of the Court filed July 12 and September 17, 1954, the Plan for Terminating Form A Leases approved by the Court by order dated June 1, 1955, defendant's Report to the Court dated December 15, 1964, Appendices A through G thereto, and the annexed affidavits of the following persons sworn to on the following dates respectively—

James Forma	August 27 1964
Francis H. Gleason	September 4 1964
John R. DeWitt	September 4 1964
George M. Haddad	September 6 1964
John S. Zulick	September 6 1964
Rudolph (Rolf) Bieringer	September 9 1964
Milton M. Isenberg	September 18 1964
Richard P. Curtis	September 29 1964
Milton Carmel	September 30 1964
Harvey Steffy	September 30 1964
Abraham B. Rubin	September 30 1964
Harold Goldberg	September 30 1964
Samuel L. Slosberg	October 5 1964
Samuel Wolff	October 22 1964
T. R. Volenetz	October 23 1964
Edward J. Riley, Jr.	October 29 1964
Robert S. Lockridge	November 9 1964
Julian Samuels	November 12 1964
Adolph K. Krause	November 24 1964

Wallace J. McGrath	November 27 1964
Abraham Weinman	December 10 1964
Irving Katz	August 27 1964
Milton Heimlich	September 17 1964
Merwin F. Ashley	December 2 1964
Henry L. Waelter	December 2 1964
Richard F. Unger	December 11 1964
Donald F. Sinclair	December 15 1964
Alan E. Snow	December 17 1964
Alan W. Sampson	December 17 1964
Max W. Tetlow	December 21 1964
Karl S. Craig	December 15 1964
John W. Pratt and Andrew S. Kahr	December 21 1964

United Shoe Machinery Corporation respectfully petitions the Court pursuant to par. 18 of said decree for a finding and determination that workable competition in shoe machinery has now been established, for the vacating and setting aside of said decree accordingly, and for the entry of an amended decree in the form annexed hereto.

UNITED SHOE MACHINERY CORPORATION

By CHOATE, HALL & STEWART

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Attorneys for Defendant

Boston, Mass.

December 23, 1964

PROPOSED AMENDED DECREE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[SAME TITLE]

The parties having filed their reports to the Court pursuant to par. 18 of the decree herein dated February 18 1953 as modified by orders of the Court dated July 12 and September 17, 1954, hearings thereon having been had, and the Court having found and determined that workable competition in shoe machinery as defined in said decree and underlying findings has now been established, it is

ORDERED AND DECREED:

1. The said decree of February 18, 1953 as modified has now effected its purpose and is vacated and dissolved.

2. Until further order of the Court pursuant to par. 3 hereof defendant—

(a) shall not offer for lease any machine type unless it also offers such type for sale, and in offering such type for lease shall set such terms for leasing that machine as in defendant's judgment represent a commercially reasonable relationship between lease terms and sale terms for such type;

(b) shall not render machinery installation, instruction, repair or other services without separate charge therefor except that defendant may render without separate charge any such service in connection with a machine installation on trial or otherwise to such extent as defendant may determine to be reasonable, having regard to the customer's legitimate interest in the proper operation or fair trial of the machine;

(c) shall not include in any lease in the shoe machinery industry a full capacity clause of the form

or kind described in the said decree and the underlying findings;

(d) shall not include in the terms of or application of any lease in the shoe machinery industry any plan similar to the Right of Deduction Fund or the 1935 plan described in the said decree and the underlying findings.

3. Either party may upon written notice to the other party apply to this Court at any time for amendment or construction of this decree.

PLAINTIFF'S EXHIBIT 1

APPENDIX TABLE NO. 1

SHOE MACHINERY MANUFACTURERS, DEALERS IN USED SHOE MACHINERY, AND IMPORTERS *

Net Income (After Taxes), Net Worth, and Employees, 1963

Company	Net Income (After Taxes)	Net Worth	Employees
I. *Manufacturers* *			
United Shoe Machinery Corporation	$10,205,990	$178,733,944	21,285
Domestic operations only	6,960,876	113,211,208	6,375
Compo Shoe Machinery Corporation	33,109 [1]	4,541,149	394
International Shoe Machine Corp.	675,963	3,120,389	239
Herman Schwabe, Inc.	48,111	486,946	83
Boston Machine Works Company	70,773	1,117,664	103
Prime Manufacturing Company	(538,072)	(179,603)	55
Western Supplies Company	137,832	1,275,709	230
W. J. Young Machinery Co., Inc.	NA	450,000	75
Geo. Knight & Co., Inc.	NA	NA	75
Industrial Shoe Machinery Corp.	NA	NA	20 to 40
II. *Dealers (Used Shoe Machinery)* *			
Plymouth Machinery Co., Inc.	15,441	87,456	25
Sharaf Shoe Machinery Co.	3,000	35,000	6 to 8
Haverhill Shoe Machinery Company	5,053	130,644	12
Eastern Sewing Machine Co., Inc.	2,776	48,715	12
III. *Importers* *			
Independent Shoe Machinery Co., Inc.	4,908	74,180	30
Fortuna Machine Company	34,161	113,747	7
C. I. C. Machinery, Inc.	NA [2]	112,069	8
Delta Shoe Machinery Corp.	1,213	21,381	3
International Advisory Service	NA	NA	8

* Affidavits obtained from shoe machinery manufacturers, dealers in used shoe machinery, and importers reveal their revenues from the lease and sale of shoe machinery in 1963. Based upon such information, the manufacturers listed include the eight largest and the tenth and seventeenth largest revenue recipients; the dealers listed include the first, second, fifth, eighth and ninth largest companies, while the importers listed are the first, fourth, fifth and sixth largest recipients of revenues from the lease and sale of imported shoe machinery.

NA—Not available.

[1] Compo incurred an operating loss of $22,891; the figure herein is after the application of a special tax credit of $56,000.

[2] C.I.C. incurred a loss in 1963; the amount of the loss is not reported by the Company.

SOURCE: United Shoe Machinery Corporation and affidavits of the companies.

PLAINTIFF'S EXHIBIT 29

[G. E. Robinson Answ'd April 24, 1961]

LASTING-CEMENT SHOE UIM—A&B
Boston, Massachusetts
April 14, 1961.

C-Day, Copied by Government Date 1871-1874

MR. G. E. ROBINSON
TERMS COMMITTEE

UNITED INJECTION MOULDING MACHINE—
MODELS A AND B

Under date of April 14 you will have received Terms Notice Number B862 announcing commercial terms for the subject machines. The terms are identical for both the Model A and B. There will be a limited number of Model A machines in the field and these are already covered by specific orders. All future machines beyond these will be for the Model B. There are minor modifications in the Model B over the Model A but the prime reason for having two models is to expedite the adoption and manufacture. There should be no confusion regarding these two models.

The *United* Injection Moulding Machine—Model B moulds and attaches to a lasted shoe bottom a polyvinyl chloride sole and heel unit at the rate of one pair every 50 seconds. This works out to an 8-hour production of 400 pairs, after making allowances for mould changes, operator comfort, pushing shoe racks, etc. The end product is a light, clean, uniform shoe, which gives extremely good wear and has high customer appeal.

The process starts with a flat-lasted shoe. There is nothing extraordinary about the preparation except that the lasting must be uniform. In other words, some shoes cannot be lasted tight and others loose. The shoe is roughed like a normal cement shoe and is cemented with a special cement designed for use with PVC. A filler is cemented to the lasted bottom and serves a dual purpose. Its primary purpose is to seal off the edge of the lasted margin so the fluid plastic will not get between it and the insole.

Secondly, it reduces the volume of the sole compound required. Scrap insole material, upper leather or most any compatibly non-compressible material is satisfactory for this purpose. A heel plug is loose nailed to the heel seat. This again reduces the amount of plastic required and provides a more uniform cross-section to facilitate cooling. After last pulling the shoe is ready for the Injection Moulding Machine.

The machine consists of essentially three elements—moulds, plasticizer and injector and the conveyor. The moulds are very important and great care is taken in their design and manufacture. A pair of moulds is required for each size and half size; however, with properly designed lasts it is possible to make three widths on one pair of moulds. If the moulds are made for C width, B, C and D can be made on them. Where this is done the feather line is kept exactly the same for the three widths and the difference in fit is put in the wood above the feather line. This system has proven entirely satisfactory. Usually new lasts are required. To date we have not found any existing lasts where the relationship of the heel seat plane to that of the forepart is correct for good mould making. The correction usually found necessary to the feather line to give this proper relationship in no way affects the fit or appearance of the last.

The current net sale price of juvenile moulds is about $1250.00 a pair, depending upon the complexity of the tread design and treatment of the surface of the sole extension. No men's moulds have yet been made and, therefore, no price is available. It is expected, however, that men's moulds might cost moderately more because more time will be required in their manufacture.

Approximately 12 weeks are required to manufacture a run of moulds after receipt by Beverly Factory of all shoe materials and lasts required. Detailed information will be provided you as to the materials required and the procedure to be followed in ordering moulds.

The plasticizer and injector, as its name implies, converts by a combination of mechanical and electrical heat the PVC tape to a fluid state. This is then forced into the mould by the injector. When the mould is completely filled a "tell-tale" signals the injector cylinder that the

mould is full and cuts off the flow of plastic. This results in a uniformly filled mould, eliminates spew and automatically adjusts the amount of plastic injected for any size shoe presented to it. The conveyor which holds four pairs of moulds merely provides a storage system and cooling time for the plastic to set up.

To operate the machine the operator takes the lasted and cemented shoe from which the last has been pulled, slips it over a collapsible metal foot form, expands the last and then swings it over and clamps it on to the closed side and sole mould. This provides a cavity sealed off by the lasted shoe, the shape of which is the sole and heel unit to be produced. The operator then indexes the machine and the mould with the shoe in place is carried to the injection station where the injection automatically takes place. While this shoe is being moved from the loading station to the injection station a finished shoe is moved into the loading station, which is then removed by the operator, a new shoe slipped on the foot form and the process repeated.

The PVC sole compound is a special formulation developed by *United* to eliminate undue stiffening or cracking in cold weather and to give excellent wear. A year ago when the first experimental machine was placed on trial the sole compound sold for 85¢ a pound. The present compound is selling for 55¢ and a new compound will be available May 1 at 51¢ a pound. This cost reduction has been due to continuing development work and increased volume. We are confident that as this work progresses and the volume continues to increase the price will be reduced substantially below present levels. The compound is available in a variety of colors at a few cents per pound additional cost. It should be kept in mind that this particular PVC soling is approximately 20% lighter in weight than the average composition rubber sole. As a possible guide to you the juvenile shoes currently being made in the 8½ to 3 run, average slightly less than ½ pound per pair for soling compound.

Closely related to the soling compound is a special two-part cement for use on the shoe bottom. This cement is known as SUPERGRIP 750 and sells for $1.80 a quart. About 100 pairs of juvenile shoes can be processed with one quart. This cement is packaged in quarts only be-

cause it is a two-part cement and after mixing the shoes to which it has been applied must be processed through the Injection Machine within 3 hours. If the cement were packaged in larger containers it would not be possible to get all the shoes cemented from the larger container through the Injection Machine before the maximum time limit of 3 hours had expired.

As for the economics of the process, we cannot be of much specific help in this area because the rate at which the machine is run and the rate at which the mould cost is written off represent a substantial factor in the cost of the shoe. For instance, if a customer installed a machine on a lease basis, wrote the initial payment off over 5 years and averaged 12,000 pairs of shoes a month, a machine cost of 9¢ per pair would result. If on the other hand he averaged 20,000 pairs a month the machine cost would be reduced to approximately 6½¢ a pair. We can say, however, that so far some 300,000 pairs of juvenile shoes have been made which have been readily sold and accepted by the trade and are reported to have provided a substantial saving to the manufacturer over the so-called "Bond Welt" process and three-sole Stitchdown which they have replaced.

We believe we are safe in saying that to reduce the machine and mould cost to a reasonable level it will be necessary to run the Injection Moulding Machine on a multiple shift basis. This does not mean that the whole factory must run on multiple shifts but only the Injection Machine, the Bottom Cementer and Loose Nailer. This is possible because if the shoes are sufficiently dry the last may be pulled and the shoes for the second and third shift stored off-the-last.

As you will have gathered from the foregoing, the work to date has been confined to the juvenile and boys' runs. This should in no way be construed to mean that the process is limited to these runs. We are currently making trial moulds for men's sizes and experimental work is underway to adapt the process to utilize string lasted uppers such as are so popular in the low price flattie casual vulcanized field.

We are prepared to accept machine orders on a specific order basis. Because of the magnitude of the machine we

do not propose to build machines in large lots. We have in process a lot of 25 machines, 17 of which are already committed. Shipping of these 17 will not be completed until mid-December, which means that delivery of any new order could not be expected until after that time. This, however, should not prove a deterrent to your soliciting orders because past experience has indicated that at least six months will be required for a customer to select, have checked and provide lasts and materials and for us to build his initial set of moulds. Once a customer has become familiar with the steps necessary before moulds can be commenced the overall period can be reduced to about four months.

We believe the *United* Injection Moulding Machine—Model B represents an important step in what appears to be a major new bottoming process. We also believe it represents a very important source of new revenue to the Corporation. We are certain you will find very keen interest in the field regarding this machine and process. We are also certain that with a machine and process as new as this there will be many questions which cannot be anticipated. When you encounter such situations we trust you will communicate with us immediately and we will do our best to be of assistance.

R. C. MARCY
R. C. Marcy, Lasting-Cement Shoe Department

MS/AMH

TABLE 2 A

NUMBER OF USMC AND ALL OTHER SHOE MACHINES IN THE 18 MAJOR AND 12 MINOR SHOE MACHINE CATEGORIES, AS SHOWN BY FOUR STUDIES, 1947, 1949, 1963, 1964

Category	1947 OMIR Study		1949 Government Sample		1963 USMC Sample (Including Machines Manufactured by United and Others of a Type Currently Offered by United)		1963 USMC Sample Updated to 1964 * (Including Machines Manufactured by United and Others of a Type Currently Offered by United)	
A. Major	USMC	All Others	USMC	All Others	USMC	All Others	USMC	All Others
1. Clicking	16,346	539	568	10	1,018	110	947	114
2. Eyeletting	2,296	545	48	12	154	33	163	33
3. Cutting Press	3,319	316	47	12	93	18	93	13
4. Pulling Over	3,145	19	89	0	179	26	180	31
5. Lasting	12,561	796	403	17	456	112	397	122
6. Welt Sewing	1,470	40	36	0	73	0	71	0
7. Inseam Trimming	595	3	15	0	33	5	34	4
8. Outsole Laying	1,029	99	18	1	25	56	25	58
9. Rough Rounding	1,430	31	35	0	77	2	66	2
10. Outsole Stitching	3,537	309	100	4	208	26	198	29
11. Cement Sole Attaching	870	1,319	19	60	36	72	42	69
12. Littleway Lockstitch	580	58	20	2	63	2	74	2
13. McKay Chainstitch	498	65	11	2	7	0	6	0
14. Loose Nailing	1,224	23	20	0	78	13	76	13
15. Outsole Leveling	1,082	29	41	3	44	0	44	0
16. Fibre Fastening	470	0	6	0	20	0	24	0
17. Heel Attaching	3,168	230	110	6	120	38	116	44
18. Slugging	773	72	18	11	0	0	0	0
Injection Moulding [1]	------	------			3	0	4	0
Sub-total	54,393	4,493	1,604	140	2,687	513	2,560	534
B. Minor								
19. Cement Shoe	3,415	2,130	95	139	194	191	188	198
20. Cutting Die	673	87	19	4	0	0	0	0
21. Eyeletting	839	0	5	0	6	7	6	7
22. Fitting Room	13,555	9,730	587	726	867	542	874	558
23. General	19,416	7,781	993	312	1,233	725	1,213	754
24. Goodyear	7,722	1,077	191	38	319	146	291	153
25. Heeling	3,502	695	104	20	65	14	61	14
26. Lasting	3,192	438	105	13	196	47	182	53
27. Littleway	853	50	31	1	5	5	4	6
28. Metallic	3,380	986	108	91	129	226	118	223
29. Pulling Over	4,138	138	160	7	210	151	205	179
30. Rubber Shoe	709	769	1	0	15	42	15	43
Sub-total	61,394	23,881	2,399	1,351	3,239	2,096	3,157	2,188
GRAND TOTAL	115,787	28,374	4,003	1,491	5,926	2,609	5,717	2,722

* October 1, 1964

[1] This major category was not in existence in 1949.

SOURCE: Printouts for 1963 and 1964 furnished by letters from counsel for United dated December 21, 1965, and February 8, 1966, respectively; United Shoe Machinery List of "Shoe Machinery Lease Terms and Sale Prices" (effective January 2, 1964); Plaintiff's OMIR and 1949 Sample Tables as contained in the Court's opinion in original proceeding, reported at 110 F. Supp. 304-06.

TABLE 2 B

PERCENTAGE OF USMC AND ALL OTHER SHOE MACHINES IN THE 18 MAJOR AND 12 MINOR SHOE MACHINE CATEGORIES, AS SHOWN BY FOUR STUDIES, 1947, 1949, 1963, 1964

Category	1947 OMIR Study		1949 Government Sample		1963 USMC Sample (Including Machines Manufactured by United and Others of a Type Currently Offered by United)		1963 USMC Sample Updated to 1964 * (Including Machines Manufactured by United and Others of a Type Currently Offered by United)	
A. Major	USMC	All Others	USMC	All Others	USMC	All Others	USMC	All Others
1. Clicking	97%	3%	98%	2%	90%	10%	89%	11%
2. Eyeletting	81	19	80	20	82	18	83	17
3. Cutting Press	91	9	78	22	84	16	88	12
4. Pulling Over	99	1	100	0	87	13	85	15
5. Lasting	94	6	96	4	80	20	77	23
6. Welt Sewing	97	3	100	0	100	0	100	0
7. Inseam Trimming	99	1	100	0	87	13	90	10
8. Outsole Laying	91	9	95	5	31	69	30	70
9. Rough Rounding	98	2	100	0	98	2	97	3
10. Outsole Stitching	92	8	96	4	89	11	87	13
11. Cement Sole Attaching	40	60	24	76	33	67	38	62
12. Littleway Lockstitch	91	9	91	9	97	3	97	3
13. McKay Chainstitch	88	12	85	15	100	0	100	0
14. Loose Nailing	98	2	100	0	86	14	85	15
15. Outsole Leveling	97	3	93	7	100	0	100	0
16. Fibre Fastening	100	0	100	0	100	0	100	0
17. Heel Attaching	93	7	95	5	76	24	73	27
18. Slugging	91	9	62	38	—	—	—	—
Injection Moulding [1]	—	—	—	—	100	0	100	0
Sub-total	92	8	92	8	84	16	83	17
B. Minor								
19. Cement Shoe	63	37	41	59	50	50	49	51
20. Cutting Die	89	11	83	17	—	—	—	—
21. Eyeletting	100	0	100	0	46	54	46	54
22. Fitting Room	58	42	45	55	62	38	61	39
23. General	71	29	76	24	63	37	62	38
24. Goodyear	88	12	83	17	69	31	66	34
25. Heeling	83	17	84	16	82	18	81	19
26. Lasting	88	12	89	11	81	19	77	23
27. Littleway	94	6	97	3	50	50	40	60
28. Metallic	77	23	54	46	36	64	35	65
29. Pulling Over	97	3	96	4	58	42	53	47
30. Rubber Shoe	48	52	100	0	26	74	26	74
Sub-total	72	28	64	36	61	39	59	41
GRAND TOTAL	80	20	73	27	69	31	68	32

* October 1, 1964

[1] This major category was not in existence in 1949.

SOURCE: Printouts for 1963 and 1964 furnished by letters from counsel for United dated December 21, 1965, and February 8, 1966, respectively; United Shoe Machinery List of "Shoe Machinery Lease Terms and Sale Prices" (effective January 2, 1964); Plaintiff's OMIR and 1949 Sample Tables as contained in the Court's opinion in original proceeding, reported at 110 F. Supp. 304-06.

PLAINTIFF'S EXHIBIT 68

UNITED SHOE MACHINERY CORPORATION

Shoe Machinery Revenues, Domestic Operations, Annually *, 1953-1963
(Dollars in Thousands)

	From Lease of Machines	From Conyersion of Leased Machines to Sale	From Sale of New Machines	Service Revenues	Parts Revenues	Total Revenues
1953	$30,470	0	$ 429	$ 57	$4,615	$35,571
1954	31,103	0	327	52	4,149	35,631
1955	31,566	$13,795	737	481	5,424	52,003
1956	26,493	7,526	1,311	1,087	6,293	42,710
1957	25,308	3,990	793	1,312	7,047	38,450
1958	23,907	3,753	1,269	1,355	7,146	37,430
1959	24,767	3,904	768	1,535	7,857	38,831
1960	23,182	5,949	800	1,571	7,611	39,113
1961	23,051	3,546	1,242	1,815	7,915	37,569
1962	23,184	2,492	1,102	1,920	8,111	36,809
1963	22,393	1,799	1,639	1,998	7,624	35,453

* Data pertain to fiscal years ended on or about February 28 of the subsequent year.

SOURCE: United Shoe Machinery Corporation.

PLAINTIFF'S EXHIBIT 69
(REVISED, see footnote to index.)

SHOE MACHINERY MANUFACTURERS *

Revenues From the Lease and Sale of Shoe Machinery and Number of Machines Leased and Sold, United States, 1963

Company	Revenues From the Lease and Sale of Shoe Machinery			Number of Machines Leased and Sold		
	Total	Sales	Leases	Total	Sold	Leased
United Shoe Machinery Corp.	$25,831,000	$3,438,000	$22,393,000	3,913	1,646	2,267
International Shoe Machine Corp.	3,903,104	294,017	3,609,087	597	62	535
Compo Shoe Machinery Corp.	2,999,110	1,435,544	1,563,566	1,359	685	674
Herman Schwabe, Inc.	763,217	763,217	NA	266	NA	NA
Boston Machine Works Company	448,033	151,127	296,906	674	379	295
W. J. Young Machinery Co., Inc.	228,680	181,250	47,430	70	50	20
Industrial Shoe Machinery Corp.	189,000	189,000	0	293	293	0
Geo. Knight & Company, Inc.	270,000	250,000	20,000	250	250	0
Markem Machine Company	224,156	224,156	0	110	110	0
Western Supplies Company	216,675	191,655	25,020	152	134	18
Lowell Moulding Corporation	202,565	69,143	133,422	78	13	65
Ro-Search, Inc.	147,900	147,900	0	58	58	0
Louis G. Freeman Company	120,672	120,672	0	117	117	0
Lacene Manufacturing Corp.	118,603	0	118,603	341	0	341
Allied Shoe Machinery Corp.	113,446	100,232	13,214	70	54	16
Prime Manufacturing Company	110,093	57,098	52,995	104	40	64
Lamac Process Company	110,000	110,000	0	61	61	0
Acme Staple Company, Inc.	92,837	40,000	52,837	1,229	175	1,054
National Development Co.	85,986	0	85,986	205	0	205
Ackerman-Gould	75,000	75,000	0	100	100	0
Circle Machine Co., Inc.	75,000	75,000	0	60	60	0
American Research & Development Co.	67,059	57,160	9,899	35	24	11
Rotary Machine Company, Inc.	55,000	55,000	0	100	100	0
Schaefer Machine Company	50,000	50,000	0	NA	NA	0
Puritan Manufacturing Company	32,299	32,299	0	35	35	0
Maxam, Inc.	31,344	17,552	13,792	94	9	85
Ornsteen Chemicals & Textiles, Inc.	30,000	30,000	0	NA	300	NA
H. & R. Manufacturing Company	28,560	NA	NA	NA	NA	NA
Braley & Walker, Inc.	28,173	28,173	0	55	55	0

* Of the seven companies from which data could not be obtained, four, namely, Formulast Corp., Kay Machine Company, Ultra Shoe Machine Company, and Allied Marker, are believed to have had combined revenues totaling not more than $400,000. For Atlas Shoe & Sewing Machine Company, Dun & Bradstreet estimates a total company income from all of its sources of $200,000 per year, and for T. J. Edwards it estimates a total company revenue of $500,000, but notes that the company is a manufacturer of marking dies and stamps. The A. D. Locke Company's only connection with shoe machinery is believed to be stapling machines for attaching buttons and bows, etc.

NA—Not available.

Company	Revenues From the Lease and Sale of Shoe Machinery			Number of Machines Leased and Sold		
	Total	Sales	Leases	Total	Sold	Leased
Brockton Performating Co.	$25,000	$25,000	0	300	300	0
Edwin B. Stimpson Co., Inc.	25,000	NA	NA	NA	NA	NA
Standard Rivet Co.	23,800	4,125	$19,675	531	10	521
Terrell Shoe Products, Inc.	21,672	21,672	0	50	50	0
Auto-Soler Co.	21,495	21,495	0	19	19	0
Potdevin Machine Company	20,500	20,500	0	35	35	0
Boston Electric Heating Corp.	20,000 [2]	20,000 [2]	0	NA	NA	NA
Campbell Bosworth Machine Co.	19,121	12,864	6,257	89	22	67
J. L. Thomson Rivet Corporation	16,008	10,767	5,241	15	8	7
Tubular Rivet & Stud Co.	12,463	0	12,463	111	0	111
The Peerless Machinery Co.	8,800	8,800	0	5	5	0
Duo-Fast Northeast, Inc.	1,386	1,386	0	22	22	0
Excel Taping Machine Co.	5,500	4,025	1,475	164	7	157
O'Donnell Rubber Products Co.	5,376	1,070	4,306	NA	NA	NA
Gould & Scammon, Inc.	3,500	3,500	0	1	1	0
Randall Leather Machine Corp.	3,250	3,250	0	3	3	0
Stewart Bros., Inc. of Lynn	3,210	3,210	0	4	4	0
Martin P. Foy & Son, Inc.	2,466	1,981	485	15	10	5
Reece Folding Machine Co.	2,400 [3]	2,400 [3]	0	1 [3]	1 [3]	0
Henry S. Blackwood, Inc.	1,895	1,635	260	9	7	2
Fales L. F. Machine Company	1,835	1,835	0	1	1	0
Kensol-Olsen Mark Corp.	1,300	1,300	0	1	1	0
Bowcraft Trimming Co.	822	822	0	11	11	0
Watlow Electric Manufacturing Company	2,301	2,301	0	40	40	0
American Shoe Specialties Co., Inc.	1,000	1,000	0	25	25	0
American Machine & Foundry Company	84,000	0	84,000	140	0	140
Diamond Machine Company [5]	72,682	72,682	0	54	54	0
D & B Die Works	3,600	3,600	0	50	50	0
Bostitch, Inc.	2,713	2,713	0	103	103	0
Binks Manufacturing Co.[6]	200	200	0	NA	NA	NA

[1] Includes a small amount of lease revenues.

[2] Includes revenues obtained from non-shoe industries.

[3] Estimated by the Government based on the company's reported total revenues of $7,200 from the sale of four shoe machines for the period 1961-1963.

[4] Data pertain to the number of shoe machines converted to sale from lease (1,385) and the number of shoe machines sold (new machines) (261).

[5] Includes Lewiston Machine Co.

[6] Company states that its total lease and sale revenues did not exceed $200.00.

SOURCES: Affidavits of the companies.

PLAINTIFF'S EXHIBIT 70
(REVISED, see footnote to index.)

SHOE MACHINERY MANUFACTURERS *

REVENUE DERIVED FROM THE LEASE AND SALE OF SHOE MACHINERY IN THE UNITED STATES, 1963 **

Company	Revenue from Lease and Sale of Shoe Machinery	
	Dollars	Percent
United Shoe Machinery Corporation	$25,831,000	71.8%
Compo Shoe Machinery Corporation	2,999,110	8.3
International Shoe Machine Corp.	3,903,104	10.8
Western Supplies Company	216,675	0.6
Herman Schwabe, Inc.	763,217	2.1
Prime Manufacturing Company	110,093	0.3
Boston Machine Works Company	448,033	1.2
Louis G. Freeman Company	120,672	0.3
W. J. Young Machinery Co., Inc.	228,680	0.6
Geo. Knight & Co., Inc.	270,000	0.8
Industrial Shoe Machinery Corp.	189,000	0.5
Markem Machine Company	224,156	0.6
Lowell Moulding Corporation	202,565	0.6
Allied Shoe Machinery Corp.	113,446	0.3
Lamac Process Company	110,000	0.3
Ro-Search, Inc.	147,900	0.4
Lacene Manufacturing Corp.	118,603	0.3
TOTAL	$35,996,254	100.0%***

* Manufacturers of new machinery receiving more than $100,000 from the lease and sale of shoe machinery in 1963.

** Data pertain to revenues generated from the lease and sale of shoe machines for use in shoe factories.

*** Components do not add to 100% because of rounding; they add to 99.8%.

SOURCE: Affidavits of manufacturers.

PLAINTIFF'S EXHIBIT 71
(REVISED, see footnote to index.)

SHOE MACHINERY IMPORTERS

Revenues Derived From the Lease and Sale of Shoe Machinery and the Number of Shoe Machines Leased and Sold in the United States by Companies Whose Principal Shoe Machinery Activity is Importing Shoe Machinery, 1963

Company	Shoe Machinery Revenues			Number of Shoe Machines		
	Total	Leases	Sales	Total	Leased	Sold
Independent Shoe Machinery Co., Inc.	$526,610	0	$526,610	49	0	49
Fortuna Machine Company	13,335	0	13,335 [1]	125	0	125
Ludlow Enterprises	200,806	$ 800	200,006	733	8	725
Automatic Work Products	121,568	0	121,568	10	0	10
Continental Shoe Products	104,514	19,135	85,379	27	8	19
International Advisory Service	47,317	0	47,317	11	0	11
Sagem Shoe Machinery Corp.	16,531	0	16,531	3	0	3
C. I. C. Machinery, Inc.	27,476	16,476	11,000	32	26	6
Delta Shoe Machinery Corp.	18,691	0	18,691	45	0	45
Pilgrim Shoe & Sewing Machine	3,500	NA	NA	NA	NA	NA
R. E. King Co., Inc.	590	0	590	3	0	3
Archie Solomon & Associates	1,000 [2]	NA	NA	NA	NA	NA

NA—Not available.

[1] Company states that practically all of their revenues are derived from the sale of shoe machinery.

[2] Company states that total revenue would not exceed $1,000.

SOURCES: Affidavits of the companies.

PLAINTIFF'S EXHIBIT 72

APPENDIX TABLE 7—USED SHOE MACHINERY DEALERS

Total Company Revenues, Total Assets, Net Worth, Net Profit After Taxes, and Employees; Revenues From the Lease and Sale of Shoe Machinery and Number of Shoe Machines Leased and Sold, United States, 1963

Company	Total Company Revenues	Total Assets	Net Worth	Net Profit After Taxes	Employees	Revenues From the Lease and Sale of Shoe Machines [1]			Number of Shoe Machines Leased and Sold [1]		
						Leases	Sales	Total	Leased	Sold	Total
Plymouth Machinery Co., Inc.	$1,146,000	$1,225,869	$ 87,456	$15,441	25	$250,000	$950,000	$1,200,000	400	1,600	2,000
Louis Goodman Machinery Corp.	NA	NA	NA	NA	NA	2,500	364,189	366,689	10	1,250	1,260
Lewiston Shoe Machinery Co.	NA	NA	NA	NA	NA	1,187	275,875	277,062	14	533	547
Sharaf Shoe Machinery Co.	340,000	119,000	35,000	3,000	6-8	1,500	250,000	251,500	NA	NA	NA
Haverhill Shoe Machinery Company	450,696	190,751	130,644	5,053	12	0	176,173	176,173	0	341 [4]	341 [4]
Eastern Sewing Machine Co., Inc.	509,319	242,273	48,715	2,775	12	7,240	152,882	160,122	15	304	319
J. Itzkowitz Sewing Machine Co.	NA	NA	NA	NA	NA	2,155	126,460	128,615	9	148	157
Hyman Koppel	NA	NA	NA	NA	NA	0	101,525	101,525	0	287	287
Lowell Shoe Machinery & Supply Co.	NA	NA	NA	NA	NA	1,426	77,154	78,580	25	263	288
Federal Sewing Machine Co.	NA	NA	NA	NA	NA	0	75,000	75,000	0	300	300
Sloan Shoe Machinery Co.	NA	NA	NA	NA	NA	500	70,091	70,591	NA	NA	NA
Cohen Shoe Machinery Co.	NA	NA	NA	NA	NA	NA	NA	61,667	6	289	295
C. F. Bogle Machinery & Supply	NA	NA	NA	NA	NA	0	50,000	50,000	0	40	40
Acme Sewing & Shoe Machinery Co.	NA	NA	NA	NA	NA	552	40,478	41,030	2	118	120
Lawrence Sewing Machine Co.	NA	NA	NA	NA	NA	0	38,611	38,611	0	175	175
American Sewing Machine Co.	NA	NA	NA	NA	NA	0	16,483	16,483	0	94	94
Garr Industrial Machine & Supply Corp.	NA	NA	NA	NA	NA	150	12,500	12,650	1	9	10
Hoffman Bros.[2]	NA	NA	NA	NA	NA	0 [3]	5,500 [3]	5,500 [3]	NA	NA	NA
E. H. Hall Co., Inc.	NA	NA	NA	NA	NA	0	5,355	5,355	0	15	15
S. Goltz & Co.	NA	NA	NA	NA	NA	0	4,000	4,000	0	10	10
Los Angeles Shoe Machinery Corp.	371,569	NA	NA	NA	NA	0	121,569	121,569	NA	NA	NA
Rapid Shoe Machinery Sales Corp.	166,004	NA	NA	NA	NA	0	166,004	166,004	0	NA	NA

NA—Not available.

[1] Data pertain to shoe machines in shoe factories.

[2] Company reported, in addition, sales of $29,885 of skiving machines as representative of Fortuna Machine Co.

[3] "For 1963 our company's revenues from the sale of used shoe machinery in the United States was not more than $5,500.00." Company affidavit, July 12, 1965.

[4] Data pertain to United Shoe Machinery Corporation shoe machines sold; data pertaining to the sale of non-United shoe machines are not available.

SOURCES: Affidavits of the companies.

PLAINTIFF'S EXHIBIT 73
(REVISED, see footnote to index.)

REVENUE DERIVED FROM LEASE AND SALE OF SHOE MACHINERY, 1963

	Revenue	Percent of Total
By United (Domestic only)	$25,831,000	62.2%
By all other manufacturers	11,229,807	27.0
By all used machinery dealers	3,408,726	8.2
By all companies classified as importers	1,081,938	2.6
Total	$41,551,471	100.0%

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 7198

UNITED STATES OF AMERICA, PLAINTIFF

-against-

UNITED SHOE MACHINERY CORPORATION, DEFENDANT

STIPULATION NO. 1

* * * *

10. That no independent repair service organization (i.e. an organization independent of defendant or shoe machinery companies or shoe manufacturing companies) has developed in the United States since 1955;

* * * *

/s/ Margaret H. Brass
MARGARET H. BRASS

/s/ W. Randolph Elliott
W. RANDOLPH ELLIOTT
Attorneys, Department of Justice

/s/ Robert Proctor
ROBERT PROCTOR

/s/ Ralph M. Carson
RALPH M. CARSON
Attorneys for Defendant

Boston, September 17 1965

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 7198

UNITED STATES OF AMERICA, PLAINTIFF

-against-

UNITED SHOE MACHINERY CORPORATION, DEFENDANT

STIPULATION NO. 3

* * * *

1. In 1964 and 1965 the plaintiff contacted all companies which either the plaintiff or defendant thought could possibly be either manufacturers, importers or distributors of new shoe machinery or rebuilders or dealers in used shoe machinery in the United States, to obtain information concerning their operations. One hundred and three companies provided, in affidavit form, varying amounts of information regarding their shoe machinery operations between 1947 and 1964.

* * * *

5. The plaintiff represents that it has been unable to obtain extensive information on the operations of second-hand dealers for the year 1955, but that data were obtained for both 1955 and 1963 for three companies, namely, Lewiston Shoe Machinery Company, Inc. (Lewiston), Haverhill Shoe Machinery Company, Inc. (Haverhill) and Cohen Shoe Machinery Company, Inc. (Cohen). In 1963 these companies were third, fifth and twelfth largest, respectively, in the lease and sale of shoe machinery as determined from revenue statistics obtained from the 22 used shoe machinery dealers found to exist in 1963. Total company revenues for these three companies for 1955 and 1963 were as follows:

Company	1955	1963
Haverhill	$218,000	$451,000
Lewiston	75,000	277,000
Cohen	66,000	100,000

The total company revenues of Lewiston and Cohen were derived in both years almost exclusively from the sale of used shoe machinery and parts. The machinery revenues for 1963 of Haverhill ($338,000) were divided almost equally between shoe machinery ($176,000) and dry-thread sewing machinery ($162,000). An estimate furnished by Haverhill in its affidavit states that in 1955 approximately 34 percent of its machine revenues of $163,000 was from shoe machinery sales.

* * * *

/s/ Margaret H. Brass
MARGARET H. BRASS

/s/ W. Randolph Elliott
W. RANDOLPH ELLIOTT
Attorneys, Department of Justice

/s/ Robert Proctor
ROBERT PROCTOR

/s/ Ralph M. Carson
RALPH M. CARSON
Attorneys for Defendant

Dated: May 25, 1966

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 7198

UNITED STATES OF AMERICA, PLAINTIFF

-against-

UNITED SHOE MACHINERY CORPORATION, DEFENDANT

STIPULATION NO. 4

* * * *

12. That the non-United machines listed in the attachment to the affidavit of Milton Heimlich of Plymouth Shoe Machinery Company sworn to September 17, 1964, and stipulated by the parties in Stipulation No. 1 as the direct testimony of the affiant, includes dry-thread sewing machines. According to Mr. Heimlich's best estimate these dry-thread sewing machines account for 70 to 75 percent of the total non-United machines listed in said attachment.

* * * *

/s/ Margaret H. Brass
MARGARET H. BRASS

/s/ W. Randolph Elliott
W. RANDOLPH ELLIOTT

/s/ Robert J. Ludwig
ROBERT J. LUDWIG
Attorneys, Department of Justice

/s/ Robert Proctor
ROBERT PROCTOR

/s/ Ralph M. Carson
RALPH M. CARSON
Attorneys for Defendant

Dated: September 15, 1966

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 7198

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED SHOE MACHINERY CORPORATION, DEFENDANT

STIPULATION NO. 6

IT IS STIPULATED between the parties above named, for the purpose of this case only and subject to all proper objections (including relevance and materiality) and subject also to the right of the party concerned to question the significance or legal effect of the matters stipulated.

1. If the items described below which Messrs. Hardy, Carey and Sessler of Compo Shoe Machinery Corporation would testify are in their opinion devices and not shoe machines were excluded from Defendant's Exhibit 64 the results would be as follows:

USM	COMPETITIVE	TOTAL
6,176 (57.1%)	4,641 (42.9%)	10,817

2. The items which would be removed and their numbers would be as follows:

	USM	Others
Staplers		150
Thermaguns	15	61
Steamers	15	301
Treeing Machines		143
Presses		50
Stitch Markers		189
Category 20 Cutting Machines		19
Category 21 Fitting Room Machines (Presses, Hooksetting, Eyeletting)	13	53
Miscellaneous		27
Total	43	993

3. The defendant does not, however, concede that the items listed in Paragraph 2 of this Stipulation are devices and not shoe machines.

4. A number of the items which are listed in Paragraph 2 of this Stipulation were included in the original proceedings in this case in Plaintiff's Tables Accompanying Requests For Simple Findings of Fact B-11 and B-14 as non-United Shoe machines. If only those items in Paragraph 2 of this Stipulation which were not previously included in tables accompanying Requests for Simple Findings of Fact B-11 and B-14 were excluded from D-64 the result would be to exclude 28 United machines and 492 non-United Machines. If only these exclusions were made from Defendant's Exhibit 64 the results would be as follows:

USM	COMPETITIVE	TOTAL
6,191 (54.6%)	5,142 (45.4%)	11,333

/s/ Margaret H. Brass
MARGARET H. BRASS

/s/ W. Randolph Elliott
W. RANDOLPH ELLIOTT

/s/ Robert J. Ludwig
ROBERT J. LUDWIG
Attorneys, Department of Justice

/s/ Robert Proctor
ROBERT PROCTOR

/s/ Ralph M. Carson
RALPH M. CARSON
Attorneys for Defendant

Date: November 3, 1966

DEFENDANT'S EXHIBIT 86

BERTRAND FOX
Curriculum Vitae

Edsel Bryant Ford Professor of Business Administration and Director of Research, Harvard Business School.

Degrees: AB Northwestern Univ., 1929
AM Harvard Univ., 1933
Ph D Harvard Univ., 1934 in Economics and Statistics

Statistician, Harvard Economic Society, 1929-1932

Instructor in Economics, Harvard Univ., 1932-1935

Ass't. Professor to Professor of Economics, Williams College, 1935-1949

Director, Military Division, 1941-1944; Deputy Director, Program Bureau, 1942-1944; Director, Program and Statistics Bureau, 1944-1945—War Production Board.

Professor of Business Administration, Harvard Business School, 1949- ; Co-Director, Mobilization Analysis Center, 1951-1953; Director of Research, 1953- ; Edsel Bryant Ford Professor, 1954-

Administrator, Merrill Foundation for the Advancement of Financial Knowledge, 1947-1963.

Research Director, National Commission on Money and Credit, 1958-1961.

[fol. 1430]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C. A. No. 7198

WYZANSKI, Ch. J.

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED SHOE MACHINERY CORPORATION, DEFENDANT

APPEARANCES:

Margaret H. Brass, Esq., and Robert J. Ludwig, Esq., and W. Randall Elliott, Esq., Attorneys for the Government.

Robert Proctor, Esq., Ralph M. Carson, Esq., Taggart Whipple, Esq., Louis L. Stanton, Esq., and Charles Gerlinger, Esq., Attorneys for the Defendant.

John Hally, Esq., Attorney for amicus curiae New England Shoe and Leather Association.

Court Room No. 6
Federal Building,
Boston, Massachusetts,
October 27, 1966

* * * *

[fol. 1432] BERTRAND FOX, Sworn

DIRECT EXAMINATION

Q (By Mr. Whipple) Will you state your name and address for the record?

A My name is Bertrand Fox. My address is 18 Edgewood Road, Lexington, Massachusetts.

Q I show you a sheet with your name on it entitled, "Curriculum Vitae" and ask you whether this accurately states your Curriculum Vitae?

A Yes, sir.

MR. WHIPPLE: I offer it in evidence just to save time, your Honor.

MISS BRASS: No objection.

THE COURT: Admitted.

(Curriculum Vitae of Bertrand Fox marked Exhibit D-86)

Q Since May, 1963, have you been retained by counsel for United Shoe as an economic advisor to assist in the preparation of economic and statistical material for C-day?

A Yes, sir.

* * * *

[fol. 1433] A In the preparation of data for the C-day review, we developed a series of studies or this series of studies was initiated first to ascertain the nature and the extent of the alternatives available to producers of shoes in the selection of shoe machinery; second, to identify the changes in such alternatives during the decade since the decree; and third, to provide an estimation of the [fol. 1434] patterns of alternatives revealed and the changes therein.

MISS BRASS: Your Honor, I have no objection to the witness referring to notes to check any matter he wants to check, but I do not think he should read a statement into the record. He appears to be reading.

THE COURT: I will allow him to read a statement. His testimony is of a nature in which it is very important for him to be precise.

Dr. Fox, did you yourself prepare the notes that you have in front of you?

THE WITNESS: I did, sir.

These purposes, of course, are consistent, as I saw it, with Paragraph 7 of the Court's pretrial order and also grew out of my own belief that the single most significant requirement for effective or workable competition is the existence of realistic alternatives for buyers of a product so that they, by switching among sellers, can exercise pressure on each seller toward efficiency, price reductions, profits, improvements in products, improvements in processes. So that we focused initially all of these studies

on the existence of alternatives available to the shoe manufacturer.

Q Will you describe your role in connection with the [fol. 1435] preparation of Defendant's 54 which are the so-called flow charts that Mr. Unger had prepared?

A Based on general reading about the nature of the industry and based on discussions with United Shoe personnel, we became convinced of the heterogeneous character of the shoe machines. Many of them represented alternatives to other machines, let's say, in functions. Others preceded certain machines in the shoe making function and in essence were not alternatives but were complementary and we wanted to get—I wanted to get a picture so that I could see in visual form the nature of the functions performed in the process of shoe making and the alternatives that existed for shoe manufacturers in, let's say, the selection of shoe machinery, and we requested that these set of charts be designed in such a way as to illustrate the flow of operations in shoe making, the relationships among the various operations which were set forth in the flow, and the extent to which various alternatives or that various operations or groups of operations represented alternatives among themselves.

Our objective was to set forth as clearly as possible the nature of the choices available to shoe manufacturers [fol. 1436] in the selection of shoe machinery, both within a particular group of machines and among classes of shoe machines. And the general instructions we gave for the preparation of the charts were to be consistent with this kind of pattern.

A second point involved—and this developed only as the charts were being born and were beginning to take form—was our insistence that each machine operation or each box on the chart represent only a single function so that the machines offered for the function would be alternatives or alternative means of performing the function and in this sense substitutable for each other. And we wanted this degree of substitutability within each machine operation to be high.

Q With respect to Defendant's Exhibit 55 and 55A, Schedule B-1, will you describe your role in connection

with the preparation of that exhibit with its supplement 55A?

A The purpose of Schedule B-1 was to try to obtain a list of the alternatives available to shoe manufacturers in the sense of the list of suppliers offering machines and hence the available alternatives for the shoe manufac-
[fol. 1437] turer.

We were aware of extensive lists within United Shoe, lists of various machines and types of machines obtained from the factory management conferences, the exhibitors there, the list of machines offered, various manufacturers' brochures, advertisements, general knowledge of United personnel, etc.

And we wanted to be absolutely sure that all of those involved in these lists were currently offering machines and that these were bona fide offers and that the machines or machines of that type were currently available to shoe manufacturers as of the end of 1964.

So that on the basis of these preliminary lists, these were sent out to the branches, essentially for screening, and the idea was for them to eliminate from these initial lists any name which was not actually offering machines in their district; and for evidence of availability, we insisted that they have evidence of at least one installation of a new machine in their district. And during this process many of the names of suppliers which had been on the original lists were eliminated and we got this refined list which we believe represented or represents the avail-
[fol. 1438] able machines as of the end of 1964.

THE COURT: Just to take one example, do you mean to say that every time the phrase "second-hand dealers" appears, you knew that as of the date in 1964 the second-hand dealers had a machine of that type available or did you merely know that a machine of that type had been acquired from a second-hand dealer and was installed in some factory?

THE WITNESS: My earlier comments related only to offerings of new machines.

As to second-hand, the branch officers were to identify whether there had been an installation of a second-hand machine of United origin within the past three or four years.

THE COURT: So you wouldn't know whether it was available currently or not available currently in the second-hand market?

THE WITNESS: No, sir.

THE COURT: Now, what about an example such as Compo? Do you mean to say that you were sure that as of the date in question Compo was currently offering the machine?

THE WITNESS: These were the instructions to the [fol. 1439] branch managers, sir. I was not involved in the implementation of this, but the intent of the instructions, and the intent was to develop such a list so that the machines listed, for example, under Compo are supposed to represent the machines currently available from Compo which they are currently offering or were currently offering as of the end of 1964. This is the intent of it.

[fol. 1440] The COURT. And that you say was a standard which was applied in connection with each of these suppliers in Defendant's Exhibit 55 with respect to each type of machine?

The WITNESS. These were the instructions, sir. This was the intent.

The COURT. And those were instructions which were prepared under your supervision and with your cooperation?

The WITNESS. The detailed instructions to the field were not prepared by me, but I knew what they were, and I knew what they were attempting to achieve. I saw some of the correspondence back and forth, the attempts to check and refine, and it seemed to me it had been done well.

The COURT. Am I to understand that you checked the answers to see whether they corresponded to the type of instructions which you have spoken of?

The WITNESS. I did not check the answers.

I looked at some of the returns and saw the kinds of questions and the nature of the evidence which they were sending in.

The COURT. And it was your impression that the [fol. 1441] answers reflected the respondent's view that the machine in question was currently available?

The WITNESS. Currently available, yes, sir. Now in the discussion of yesterday, I think the term was used "significant competition," or, "a significant competitor," and the only thing that we were trying to establish there is not significant in the sense of substantial but significant that there was a bona fide offering available at that time and represented the current offerings being made of machines of the various kinds.

Actually, nothing would have pleased us more than to be able to get, let us say, current information as to the number of installations or the number of machines in place. But let me indicate that because of the very large number of both machine operations and, second, as will be seen later, the shipments in some of these operations are so small per year that we would have had to have an enormous sample of factories, or almost a complete census, to be able to get reliable figures in this kind of detail, so that both in terms of the time involved or the expense involved or the ability to get cooperation, going after this kind of thing just was not feasible, so that [fol. 1442] these figures do not represent in any sense any quantitative significance but they do in our judgment represent a list of the current offerings and a list of the machines available for each of the machine operations for which the data are set forth in Schedule B-1.

* * * *

[fol. 1443] Q With respect to Schedule B-3 in Defendant's 55, will you describe what you did in connection with the preparation of that exhibit?

A This is a set of measures called Market Attractiveness or Relative Economic Attractiveness, and our objective there was to develop a set of measures of relative, and I emphasize the term, relative economic attractiveness of the various machine operations.

What we wanted was a set of measures which would have enabled us to explain the varying number of suppliers per machine operation. We were trying to get at a means of classifying machine operations to be able to explain the kind of differences we saw in the numbers of suppliers per machine operation.

We believe that the explanation came largely in terms of the economic attractiveness of the operation, and we tried to develop some discriminatory measures there to enable us to make these broad classes. Our approach to this problem was entirely experimental and empirical.

* * * *

[fol. 1448] * * * Our objective was to get a measure, a set of ratings which would enable us to classify machines as to attractiveness to people coming into the production of machines for that function, and empirically it worked out that this gave us a very efficient system.

* * * *

[fol. 1451] Q With respect to Defendant's 56, the schedule showing dates of Entry, would you describe, if you will, the preparation of that exhibit?

A Because, both of our interest in focusing on changes since the Decree and also looking at the effects of the Decree we were extremely insistent on getting data as to the timing of new offerings and the timing of new entries into the industry, and so our instructions were for each of the offerings listed in Schedule B-1, we wanted them to get the earliest date of each offering of a supplier and, as far as an importer, the first offering in the American market by a supplier, which could be clearly substantiated in terms of records, let us say, available to United, and we also asked for a distinction among types of suppliers to be recorded in Schedule C because we wanted to distinguish between domestic suppliers, domestic producers and offerors of foreign machines, and we also wanted to distinguish among various kinds of offerors of foreign machines. Some were being offered by [fol. 1452] domestic shoe machine manufacturers, in addition to their own domestic production, and some were being offered, two by a domestic shoe manufacturer, and some were being offered by the foreign manufacturer himself, and some by another type of importer, and we wanted to distinguish among these various kinds.

Our instructions were to get this information for recording in Schedule C. This was essentially my role.

* * * *

[fol. 1453] Q Now, have you reached certain conclusions as a result of your economic analysis of these three exhibits?

A I have, sir.

Q And in reaching those conclusions, did you take into account certain characteristics of the shoe manufacturing industry and shoe machinery industry as set forth in the Court's opinion in this case in 1953 and as testified to by Mr. Unger?

A Yes, sir. I have taken that type of information into account.

Q And before you get into your detailed analysis, will you state the conclusions you have reached?

A Yes, sir.

The first one is that the realistic alternatives available to shoe manufacturers in choosing shoe machines, in our opinion, needs to be examined initially machine operation by machine operation.

Second, the character of the shoe and shoe machinery [fol. 1454] industries and the magnitude of the demands for machines for a given operation are such that a large number of competitors per machine operation is not economically feasible.

The third, since the decree, the number of competing offerings of non-United equipment has expanded to such an extent as to bring about a marked reduction in United's percentage share of total offerings.

* * * * *

[fol. 1457] The first one again is the realistic alternatives available to shoe manufacturers in choosing shoe machines, each to be examined initially machine operation by machine operation.

The second one, the character of the shoe and shoe machinery industries and the magnitude of demands for the machines for a given operation are such that a large number of competitors per machine operation is not economically feasible.

The third one, since the decree, the number of competing offerings of non-United equipment has expanded to such an extent as to bring about a marked reduction in United's percentage of total offerings.

The fourth, the response to the removal of artificial barriers to entry, entry in the form of new offerings for particular machine operations and in the form of new companies, domestic and foreign, entering the industry and in the form of older companies expanding the range of their offerings has been prompt, vigorous and at a steadily increasing rate.

[fol. 1458] The fifth one, the new offerings of non-United machines have been predominantly for the operations whose relative economic attractiveness have been high.

United's competitors have tended to avoid the relatively unattractive operations in which United was already offering new machines and second-hand machines were available.

The next one, even though the bulk of United's large number of competitors offer machines for only one or two operations, nevertheless the nature of the industry and the continued existence of such companies attest to the viability of such competitors.

Number seven, the differences in the patterns of number of competitors per machine offering are explained largely by the relative economic attractiveness of these various operations.

* * * * *

[fol. 1459] The next conclusion, the eighth, is the existence of alternative processes, sub-processes and operations of shoe making to any given operation reduces markedly the market power inherent in sole occupancy or occupancy by only a few suppliers of new machines for a particular operation.

And the ninth conclusion—the development of a widespread second-hand market for United's machines has enlarged the number of alternative sources of machines open to shoe manufacturers, especially for those operations in which the number of suppliers of new machines is very small.

And in summary, a significant effect of the decree in altering the competitive situation in the shoe machinery industry and in enlarging substantially the alternative

[fol. 1460] sources of machines open to shoe manufacturers is thus clearly evident.

Q Now, in reaching these conclusions which you have just read, have you analyzed exhibits 54, 55, 55A, 56 and 56A in relation to certain topics?

A I have.

Q And will you state those topics before you go into a detailed analysis under each topic?

A The first one is entitled, "Machinery Alternatives Available to Shoe Manufacturers."

The second is the "Patterns of New Entries into Shoe Machinery Operations."

The third is "Entries of New Companies Since the Decree."

The fourth is "Second-hand Machines Since the Decree."

The fifth is "Occupancy Patterns in Relation to Relative Economic Attractiveness."

The sixth is "Wider and More Limited Choices Among Machines."

And the seventh is the "Scope of Operations of Other Suppliers."

* * * * *

[fol. 1463] THE WITNESS: The data, schedule B, first identified that there are 126 suppliers listed in Schedule B; that is, both domestic and foreign, actively offering machines in the American shoe market.

We are also aware from published sources that there were somewhat more than a thousand factories in the industry at about that time, and we also have from Schedule A, the charts in Schedule A identified 187 operations of shoe manufacture being performed by machines. And even though the machines therein are not—or, as we look from operation to operation, some operations represent alternatives to another operation but we believe that we have to start looking at each machine operation separately to get the extent of the alternative sources for each one.

Now, in Schedule B-3, the relative ratings, the first [fol. 1464] related to the total number of machines required, sometimes called the field.

I want to indicate that if we take and divide or classify the operations into those three groups of a thousand machines and larger, this takes up 52 operations; between 150 and less than a thousand machines in place, 78 operations; and less than 150 machines in place, 52 operations.

[fol. 1464-A] Remembering that there are somewhat more than a thousand factories, it is clear that for most kinds of machines, more than 70 per cent of the kinds listed, there are more factories than the total number of machines required in terms of our estimates.

Thus some factories have no machines of a given kind, and most have, or for most machines, there are only one or two machines of a type in a factory. Thus, for most machines the breadth of the market in terms of the number of shoe factories which might acquire a machine, and in terms of the total number of machines required, is quite modest.

Our second measure that we used for rating purposes was this question of Annual Level of Shipments. These are annual level of shipments of machines from all sources. Again, our three classes were 50 and more machines, between 6 and 50, and less than 6. Only 40 operations are identified with annual shipments of more than 50 machines, 50 and more machines per year—80 of them, almost 50 per cent, between 6 and 50 machines per year, and 62 of the operations have less than 6 machines shipped per year. Thus for almost 80 per cent of the various [fol. 1465] kinds of machines Annual Shipments From All Sources is estimated at less than 50 and for about a third less than 6 new machines per year.

These figures to my mind are of critical importance in appraising the extent of competition in the sense of the number of sources of supply for the individual machine operations.

An operation requiring less than 50 machines per year could not possibly support a large number of suppliers. A few is the most that one could expect.

The same point could be made on the basis of the previous measure, the total number of machines required. Both measures indicate that most machine operations can

at best support only a very few producers of new machines, and thus the number of competitors per machine operation will be very small, even with the most vigorous competition and with no artificial obstacles to entry or expansion.

I would like to illustrate this, first, with a set of Tables.

* * * *

[fol. 1468] Q These Tables were prepared under your supervision and direction, were they?

A Completely, yes, sir. In the Charts of Schedule A there are 187 machine operations identified. And in these tabulations—I should mention this initially that five operations are omitted from all studies. One of these is in Stage 7, the operation designated 11 of Brush optional. That is omitted because the machine complement is absolutely identical with another machine operation, and we wanted to avoid double counting.

Then there are four operations which are not a single function but two or more minor functions have been put into a single operation, and these four have been omitted from all of my tabulations. Of the remaining 182 there are 9 where there was no new machine activity, that is, no offerings of new machines at the present time that we [fol. 1469] could identify, and there are 5 operations where there was neither new or second-hand machine activity identified.

In the Tables, where we will be talking about new machine operations, I will omit the 9 from each case, and where we are talking about second-hand I will omit the 5, so I will be dealing with 173 operations, or 177. The list of these omitted operations is set forth in the third page of the preface to the Tables.

As to the first of these Tables, this is essentially a frequency distribution of the 182 machine operations by the number of suppliers of new machines, only new machines, for the operation. There are really three distributions, one of domestic and/or foreign machines, and the second domestic machines only, and the third foreign machines only. The operation with the largest number of suppliers—there is one with 14, which is the largest,

and there are only four that have as many as ten suppliers. There are only 50 operations which have as many as 4 suppliers. That is a little over 25 per cent. There are 53 operations which have only a single supplier and, as I indicated, there are 9 which have no current supplier of any kind.

[fol. 1470] The same type of pattern one sees if you look at domestic manufactured machines only, where only 32 operations have as many as 4 suppliers of domestic machines, and only 55 have 3 or more domestic producers of new shoe machines, and again a larger number with only a single domestic supplier.

My conclusion is that this record confirms the expectations that have been based on the Annual Shipments data and the figures on the number of machines required as to the small numbers of suppliers per machine operation, and my conclusion is that the nature of the industry precludes any other situation where the number of shipments, the annual volume of shipments and size of demand is so slow.

The COURT. Don't you have to know anything about the profitability in order to reach that conclusion?

The WITNESS. In my judgment the number of shipments or the number of machines is so small in some cases that you could not possibly support a large number of suppliers, regardless of the profitability per machine.

The COURT. I don't know how many manufacturers of cyclatrons there are. I doubt if one cyclatron a month [fol. 1471] is sold. I doubt if one cyclatron every six months is sold.

The WITNESS. I doubt if there are very many producers.

The COURT. I beg your pardon?

The WITNESS. I doubt if there are very many producers.

The COURT. I don't know.

The WITNESS. All right.

A (Continuing.) Turning to the second Table, this is simply a distribution of the machine operations by the combined characteristic ratings. This is the sum of the three which I mentioned earlier. You will note that there

is a substantial number of operations in each of the so-called rating classes, and that they are approximately evenly distributed around a kind of neutral rating in the middle, No. 6. Actually, there are 72 in what we call "relatively attractive." That is 3, 4 and 5. And there are 79 in the "relatively unattractive." They are 7, 8 and 9.

This is what I indicated earlier is essentially a reasonably efficient set of ratings to give us the discrimination that we were after. This is simply to indicate the distribution of those ratings.

[fol. 1472] Now turning to the next section where I want to talk about the patterns of new entries, here I turn to Table 3. Incidentally, it was our intention here to try to show the response to the removal of artificial obstacles to entry, and in Table 3 we kind of asked the question, "What has been the pattern of entries and expansion in the industry since the Decree?" And we show a distribution there of the machine offerings by date of entry and by type of supplier in Table 3.

* * * *

[fol. 1487] A May I continue with Table 3?

It is probably already clear that this is an attempt to get the distributions of the total offerings which were being made as of the end or at about the end of 1964 by dates of entry and by the various types of suppliers offering machines.

In B-1 there is identified 505 different kinds of offerings. This is the figure in the lower right-hand corner. [fol. 1488] These are classified as the total offerings of United machines, non-United domestic machines, as the offerings of foreign machines by manufacturers of domestic shoe machines and offerings of foreign machines by other importers. And each of these totals is distributed to try to indicate the date of entry or the first offering of machines of those types by those suppliers.

As to manufacturers of domestic machines other than United, I have concluded that the number of new entries in the post decree years was slightly larger than the number of offerings—and I think I should amend that to say

the number of offerings of these same machines before 1950 which was 112.

And second, that the number of entries in each three-year period after the decree has been substantial and that the pace of entries in terms of the number of new offerings coming in each year has been increasing.

* * * *

[fol. 1490] THE WITNESS: Then as to foreign machines offered by manufacturers of domestic shoe ma-
[fol. 1491] chines, I conclude the importing and offering of foreign machines by domestic manufacturers of shoe machines presumably to broaden their lines is primarily a post-decree phenomenon; and of the current offerings of 45, 33 of them have been offered for the first time in this market, in the American market, in the post-decree years beginning 1956 and the number of entries has been substantial but we see no clear-cut trend to the entries there.

Then as to the other foreign machines, we again indicate that this appears to be a fairly recent development and that in aggregate the number of offerings of foreign machines as they have increased in the post-decree period has resulted in offerings which are substantial in amount in relation to the total offerings being made of all types of machines.

And my conclusion in connection with looking at this is that there is no question as to the vigor of entries into new operations since the decree by suppliers of machines offering competition to United. This is the purpose for which I set forth the table.

Then as to Table 4, I asked further the question have the new entries been concentrated in only a few of the many machine operations or are they widely scattered?
[fol. 1492] And I looked at the breakdown of the entries of domestic machines, new machines, non-United domestic machines by stage of shoe making for each of the sub-periods and again drew the conclusion that the new entries into shoe operations have been very widespread. They took place in each three-year period after the decree in each stage of shoe making so that we see them spread widely across the shoe machinery industry.

There is some concentration, more in some stages than in others, but this in general parallels the larger number of operations in some stages than in others, so that it is an expected result.

* * * *

[fol. 1494] The COURT. I had supposed that this as-
[fol. 1495] pect of your testimony was addressed to showing me different patterns of entry in the pre-Decree and post-Decree period, is that right?

The WITNESS. It is intended to show the pattern of entries of the offerings which are currently being made.

The COURT. Yes.

The WITNESS. Only that, sir.

The COURT. That does not seem to me to be of any particular interest. I can really see the interest that there is in patterns of entries of all machine types into shoe machinery operations, but it seems to me very strange to assume that I have any special interest in the patterns of new entries of machines found in December, 1964.

I cannot see why that is of any interest to me.

The WITNESS. I thought it would be of interest because to me the pace of new entries, I inferred, with its magnitude and its increasing pace, was the result of the removal of the artificial restrictions to entry stemming out of your Decree.

The COURT. If you stop at that point, I agree with you.

The WITNESS. So that I was impressed with the
[fol. 1496] magnitude and the pace of new entries.

The COURT. I think that is very important.

The WITNESS. This is what I was trying to present to you.

* * * *

[fol. 1497] The WITNESS. Each of the Tables indi-
[fol. 1498] dicates the distribution of new offerings as of this time, yes.

The COURT. I easily see the relevance of the Tables which refer to 1956 through 1958, 1959 through 1961, 1962 through 1964. That is all I see.

* * * *

[fol. 1499] A As to Table 6, we asked the question about the new entries, primarily, and we asked whether they were occurring as the natural response to economic factors, and if they were we expected that the distribution of the new entries would not be distributed uniformly across all operations but that a far greater proportion would be expected in the operations which were relatively attractive and only a small proportion would appear in the low rating operations, and presented in Table 6 is the distribution of the entries of the new machine offerings of non-United machines, both domestic and foreign, subdivided by the rating of the operation.

And we take the 43 entries in the early three years, and the 56 and the 90 in the Middle and Late three years, as shown by the rating distribution, and the total of the post-Decree entries in the column labeled Total, and here we see, having the top three ratings, that 69 per cent of the entries were in the attractively rated operations and [fol. 1500] only 19 per cent in the unattractive, and we inferred from this that this was a natural response to entry, where you did not have artificial barriers to entry in particular machine operations. This is in comparison to the percentage distribution for all operations. For example, we see for all operations only 41 per cent in the attractive rated operations, in contrast to these new entries of 69 per cent, much stronger in the upper group than in operations as a whole, and only 19 per cent in the low rated operations in contrast to the operation distribution of 46 per cent at the low rated operations.

* * * *

[fol. 1501] The WITNESS. And I want to call your attention, first, to Table 7, and again may I point out here that what I am trying to do is to take the list of suppliers who are currently offering machines and try to see when they enter for the first time into the industry, and so it deals only with those suppliers who are currently offering machines in the market, and by "currently" I mean as of the end of 1964.

I am trying to look at the dates at when they entered. And looking at Table 7, looking at the last column, the figure at the bottom, All Companies, that indicates that

there are 125 separate suppliers other than United listed [fol. 1502] in B-1, the Schedule B-1.

Of those 47 were offering a machine currently being offered before the Decree, or before 1950, and 22 more had offered a machine for the first time in the years 1950 to 1955, and then in the post-Decree years 11 more came in, 1956 to 1958, 19 more, 1959 to 1961 and 26 in 1962 to 1964.

Again, the number of competing companies coming into the market in the post-Decree period is increasing, so that in the last three years you get more than twice as many entries as in the first three years of the post-Decree period. This trend we also thought was a significant response to the changed environment in the industry.

* * * *

[fol. 1503] A (Continuing.) A further subdivision is in this table. We took each of the companies and tried to indicate those which were offering only a single machine, those which were offering two machines only, and those which were offering three or more. From the distribution of those shown at the bottom of the Table, of the 125 68 of the companies are offering only a single type of machine, that is, for a single operation, and 20 more are offering only two machines, and 37 are offering three or more.

We also looked at the picture to try to see whether [fol. 1504] some of those companies which were in the industry before the Decree had expanded the number of offerings in the post-Decree period, so that we subdivided the companies who were in the industry in the pre-1950 period and the 1950-1955 period as to whether or not they had expanded their number of operations in which they were offering machines in the post-Decree period.

Of those 47 who had been in the business before 1950 15 had expanded and 32 had not. Of those who had come in in the 1950 to 1955 period 13 had expanded and 9 had not.

The COURT. It could be, as far as you know, that the expanding companies were all supplying machines for the Fitting Room operations and the contracting com-

panies were supplying machines for, let us say, Pulling Over operations.

The WITNESS. There is no indication from this Table relating to that. You would have to look at that on an operation by operation basis.

A (Continuing.) The other conclusion which we felt, or I felt, appropriate, let us say, from this Table is indicating the number of companies which were in existence before 1950, or which came in in the 1950 to 1955 period, [fol. 1505] who were either involved in only a single operation or perhaps two operations, and who was still in existence with those same single operations or two operations at the end of 1964. My conclusion is that that kind of one operation company or two operation company apparently is a viable business for these companies, else we would not see this kind of pattern of companies with one or two operations still in existence today offering machines of that same kind. So I draw that further inference from this particular Table.

* * * *

[fol. 1507] A (Continuing.) My conclusion is that the pattern of new entries and the expansion of offerings of early entrants attest to the vigor of the response to the removal of artificial barriers to entry, and make clear the changed competitive environment of the industry today as compared to 10 or 15 years ago. These data, however, also indicate the way in which new company entries occur by offerings at first in one or a very few operations, and hence they emphasize the importance of data on individual operations.

[fol. 1508] A (Continuing) The data are also emphatic evidence of the viability of companies with only one or two machine offerings.

I want to go further in the implications on this. I said earlier in these proceedings that data have been prepared from the sample survey of the origin of machines in place in the shoe manufacturing industry as of 1963 and is up-dated to '64. The survey data of the shoe machinery population showed a marked decrease in the proportion of the machines in place which had been acquired from

United or which were of United manufacture as compared to the pattern before 1950.

I want to indicate that the two kinds of data on new entries which have just been presented reinforce the conclusions from the sample survey and help to explain why the proportions of non-United machines have increased so markedly.

* * * *

[fol. 1512] THE WITNESS: I wanted to make one additional point and that is in relation to the companion data from the survey which related to changes over the course of a year, and sources of machine acquisitions by the sample companies are an indication of the source patterns of new shipments of machines, and the much smaller percentage share of the shipments of United as compared to the population figures is also in line with the changed pattern of the number of companies competing in the industry and of the competing offerings now as compared to the years before 1950. And if the shipment share is lower than the population share, it is inevitable that the population share must come down further.

* * * *

[fol. 1521] THE WITNESS: My conclusion about looking at this material on the second-hand market was [fol. 1522] that the decree had been successful in developing a second-hand market for United machines; that it was widespread, nearly as widespread as the new offerings of United.

THE COURT: Just how can you say that? Widespread seems to me to mean that it is an offer of every type or virtually every type of machine. Are you saying that that's the case?

THE WITNESS: Yes, sir. And the table—Table 11. I think it is—indicates 81 percent of the operations in which United is offering a new machine has also been identified as an installation, recent installation of a second-hand United machine in a shoe factory. I mean widespread in that sense both by rating groups and by stages and overall.

THE COURT: The only thing you are uncertain about is the volume.

THE WITNESS: We are not certain about the volume, no, sir.

Now, as to the next section, I had indicated the time I was talking about attractiveness ratings that the purpose of devising the set of ratings was to discriminate among machine operations as to relative attractiveness to try to explain the number of suppliers per operation. [fol. 1523] Table 12 is addressed to that question, and let me indicate how this was prepared. Let us take the upper left-hand corner, which is for machines or offerings given a 3 rating of attractiveness, domestically produced machines. There were 25 offerings of domestic machines, which took the number of suppliers—excuse me—there were 25 operations rated with a No. 3 rating. We took these operations and added up the number of suppliers and computed an average to get the average number of suppliers per operation. We did this for each of the rating classes to get the average number of domestic offerings, the average number of foreign offerings and the average number of total offerings per machine operation.

You will note in the bottom row, which deals with both domestic and foreign machines, that the average number of suppliers per operation decreases as we move from left to right on the high rated operations toward the low rated operations. A difference, for example, between a 3 rating and a 9 rating is 4.4 suppliers for a 3 rating and 1.4 for a No. 9 rating, and the movement is fairly consistent across as we move from the high rated to the low rated operations.

[fol. 1524] I want to emphasize there, or here, that we are aware of the fact that on the small numbers—if we take the top 3 rated groups, 3, 4 and 5, that average would be 4.2.

If we take the bottom 3, the average of those 3 would be 1.9. This is a difference of only 2.3 suppliers per operation.

We could say that 2 is insignificant, but because we are dealing with such small numbers, that small number, which is the difference, is very substantial because we get

twice as many, more than twice as many suppliers per operation than for the low rated boxes or low rated operations.

As I indicated earlier, as the characteristics of the industry preclude a large number of alternatives per operation, these differences become quite substantial, and the attractiveness ratings to me provide a good explanation of the differences in the average number of suppliers per operation. I concluded from this that this relationship of market attractiveness and number of competitors is the expected pattern in any industry or market where the natural forces of competition are not inhibited by artificial barriers to entry and expansion. That the rela- [fol. 1525] tionship exists currently in the shoe machinery industry supports the inference that artificial barriers are now absent and that realistic competition exists.

Because of the fact I used these for that inference, and because of the fact that Table 12 deals both with United offerings and non-United offerings, I wanted to show some contrasts in Table 13 between the distribution of United offerings by these ratings and the ratings of non-United equipment or non-United offerings. Table 13 shows the number of offerings of United machines by each rating class, and similarly corresponding figures for other domestic machines and foreign machines.

If we compare the distributions, we note that the distributions of the offerings of non-United domestic machines and non-United foreign machines are predominantly in the more attractively rated operations, especially in contrast to United where over half of United's offerings are still in operations which are in the unattractive group, that is 7, 8 and 9.

If we add the top three percentages for other domestic machines we see 67 per cent of their offerings in the [fol. 1526] attractive rating group, and for foreign the same figures give us 68 per cent there, and for United only 42 per cent, and the corresponding figures, if we look at the low end, where United has 50 per cent of its offerings in the unattractive, relatively unattractive operations, and only 22 per cent for non-United machines and 21 per cent for foreign machines.

So that this is additional information here that the offerings of non-United machines have tended to go towards those operations which are the relatively more attractive parts of the market and apparently have not been deterred by artificial restraints.

* * * *

[fol. 1527] A (Continuing.) Table 14 is simply a comparison of the distribution by ratings of operations of all operations and United's operations, and the only thing I want to call your attention to is the startling similarity of the two percentage distributions, and this is simply, I think, an indication of the broad line of United, and the fact that so long as United continues to offer machine types for even the little used, unpopular and possibly declining operations, its distribution of offerings by ratings will continue to show a relatively heavy concentration at the unattractive end of the rating scale.

And one final comparison on this same point is in Table 15.

In Table 15 we compare United's percentage distribution by ratings with the distribution of all non-United offerings, and again with a comparison simply of the post-Decree entries of offerings of non-United, and finally second-hand machines.

And to summarize briefly, the heaviest concentration at the attractive end comes with the post-Decree non-United [fol. 1528] offerings, slightly more toward the attractive end than all non-United offerings, much more so than with United's offerings, and the similarity of second-hand offerings and United's new offerings very close.

An additional point I would like to make about the similarity of the distribution of second-hand offerings and United's is where we see a relatively small proportion of the non-United new machine offerings at the operations which are at the unattractive end of the scale. We see a very heavy proportion of second-hand offerings. And I conclude there that second-hand offerings are providing an additional source of supply in those operations where the alternatives in the form of offerings of new machines are the smallest, and hence this part of the market, the second-hand offerings have come in at the type of opera-

tion, the rating of operation where there was the least alternatives in the form of new machines.

I am making this as a general point.

Finally, as a brief summary for this section, it can be said that the relative economic attractiveness of the various operations of shoemaking provides the major expla- [fol. 1529] nation of the differences in the number of suppliers per operation. The nature of the occupancy patterns of particular operations by offerings of suppliers other than United also suggests the absence of artificial barriers to entry into the industry or into individual operations.

Finally, the development of the second-hand market for United machines and the pattern of offerings of second-hand machines has resulted in an alternative source of supply of machines being available to shoe producers where the incentive to entry by a manufacturer of new machine is the least.

I turn now to the next section. We have been focusing or talking, at least, thus far in summarizing data and always relating the data to particular machine operations, and the various machines offered for a given operation represent reasonably close substitutes for each other in shoemaking, but the alternatives open to shoe producers are typically broader than those available only for the operation itself. One purpose of the charts in Schedule A was to portray visually the existence of alternative processes, sub-processes and operations in shoemaking. [fol. 1530] Shoe manufacturers have the opportunity to select machines not only from the alternatives available for a particular machine operation, but to choose also from alternative operations, from alternative sub-processes, and from alternative methods or processes of shoemaking.

For how many manufacturers any particular choice is important, is a question that cannot be answered generally or in statistical terms. It depends upon a manufacturer's present equipment and on his market commitments.

Something can be said, however, about choices beyond a particular machine operation level, and there can be no doubt that they enhance the effectiveness of competition.

In the first place, a broader range of such alternatives are to be found in the Lasting and Sole Attaching Stages. Here they are most numerous in the larger and more rapidly growing processes; for example, in the making of flat lasted shoes.

Second, the widened area of choice from one machine operation to several, always adds to the number of offerings from which a shoe manufacturer can select machines. [fol. 1531] Third, the additional offerings come generally from additional suppliers. Though some of the suppliers for an operation may also be suppliers for the alternative, there is less duplication than addition.

More companies, hence, are vying for the trade of the shoe manufacturer.

* * * *

[fol. 1532] The WITNESS. I would like to cite, however, at least some data relating to instances in which there might appear to be no alternative machine source open to a shoe manufacturer. These are the operations in [fol. 1533] which there are only a single supplier offering new machines.

In connection with Table 1, I indicated that there were 53 of these operations, and these are tabulated in Table 16. For 45 of those operations United is the sole supplier. Another manufacturer is the sole supplier in 8 operations.

The numbers here are distributed by attractiveness ratings. In both distributions the proportions of operations with unattractive ratings is very high. For United 34 out of the 45 operations in which they are the sole supplier are in the so-called unattractive group with the least attractiveness to competing manufacturers.

In the case of another manufacturer being the sole supplier, it is 4 out of 8. The mere fact of the unattractive ratings indicates that these are operations with little demand, frequently because most shoes are being made using other machine operations.

The ratings suggest there is no incentive for other manufacturers to develop and offer machines in competition with the current supplier.

Another limitation on the possible market power of the [fol. 1534] single supplier for these operations is the

availability of second-hand machines. Second-hand machine competition of United machines has been identified in 33 of the 45 operations in which United is the sole supplier.

Because only United's second-hand machines were identified, we could not establish the existence of such competition for the 8 operations where another manufacturer is the sole supplier simply because we could not gather such data.

And again, as a summary, there appear to be few, if any, instances of shoemaking operations for which there are not at least some alternative sources of machines.

The most obvious alternatives are the offerings of new and second-hand machinery for the given operation, but it is necessary to consider also the equipment available in alternative operations, sub-processes, and processes.

When these other alternatives are considered, the concern for the possible market power inherent in being the sole supplier of new machines for an operation practically disappears.

Now as a final section, this will not deal with the al- [fol. 1535] ternatives available to shoe manufacturers directly but with the characteristics of the companies offering machines in the shoe machinery market.

Because there has been some comment on the scope and characteristic of United's offerings, the focus here will be on the characteristics of the companies competing with United.

Before turning to specific comments I want to stress two points. First, this is an industry involving about 180 separate machine operations, each for the most part requiring a type of machine designed and built for that particular function. No company offers machines for every operation for the manufacture of every kind of shoes.

A company that did would have about 180 separate and distinct product types of varying degrees of complexity and in effect would be competing in the approximately 180 operations of the industry.

Because of this degree of sub-division of the business, there can be and are companies specializing in greater or lesser degree in parts of the total industry.

The industry is one in which a company can be effec-
[fol. 1536] tive in one or several parts without the necessity of participating in any other specific part of the business.

If a choice of a company of Company X for one operation forced the selection of a machine of the same company at another point or for many other operations, then participation by a company in only one or a few operations would be difficult.

But this is not the case, and for the most part both United and every other company face different patterns of competition in each of the machine operations in which they offer equipment.

The second point is that it was noted earlier that the magnitude of the demand for machines for most of the machine operations is small, as measured by annual shipments or the total number of machines required.

The average number of suppliers of new machines per operation is also small, about 3.

The arithmetical consequence of this situation is either a very small number of wide line companies or a sizable number of companies with narrow lines of machines or some combination of the two.

The record indicates to me a surprisingly large number
[fol. 1537] of companies competing with United, 125 in total, and because of that number most companies can only be involved in very few operations.

Because only 371 offerings of machines were being made by companies other than United around the end of 1964, the average number of offerings per company was just under three.

* * * *

[fol. 1541] THE COURT: At this point the reporter can copy the table which is at VII-3.

	Domestic Machines	Foreign Machines	Domestic and Foreign	Total Operations
Allied	7	5	1	13
Compo	21	15	3	39
Ludlow	3	2	—	5
Schwabe	8	18	1	27

THE WITNESS: Allied is offering 13 types of machines, 7 of its own manufacture, 5 foreign and for one operation both domestic and foreign.

THE COURT: That appears in the table. You don't have to recite it again.

THE WITNESS: And similar things for these others.

Now, in each of these cases the contribution of imports to the breadth of these companies' lines is relatively quite substantial and it is clear that the effect of importing is to broaden a line because almost always the foreign machines are offered in operations additional to those being [fol. 1542] supplied by the companies' domestic machines.

Now, a second feature of the picture revealed by the company data in the listings is the diversity among the companies as to the operations and combinations of operations in which they participate. This clearly is not an industry in which one follows the leader in choosing operations in which to compete. There is clearly independence of decision among suppliers in this respect. This feature of the data is summarized briefly in Table 18. It is difficult to summarize it from this point of view but at least it indicates one type of summary in Table 18.

Table 18 attempts to distribute the number of suppliers other than United and show the number of their offerings, the number of different operations supplied, and the number of stages in which machines are being offered.

For example, there are 23 suppliers offering machines in 2 stages. They involve 70 operations and 60 of them are non-duplicate to show the extent of the diversity, and we get the same picture shown for each of the other groups by number of stages.

And the point to be made here is that diversity means [fol. 1543] the interests of the various companies are to urge the use of their particular operations as opposed to those in which they are not represented, and this emphasizes the importance of rivalry among machine operations.

This concludes the presentation of the tables and I could restate the conclusions but I think they are already in the record.

THE COURT: Well, at this point I am sure you would like to have copied in VIII-1 and VIII-2; is that correct?

MR. WHIPPLE: Yes. That would be helpful, your Honor.

(VIII. SUMMARY OF CONCLUSIONS

This series of studies relating to the "changes during the last decade in demands and requirements of the domestic shoe manufacturing industry for machines for shoe production; and changes in the number and types of United and non-United equipment available" and relating to "the effect of this decree . . . in establishing workable competition" has yielded several significant con- [fol. 1544] clusions, which may be summarized as follows:

a) The character of the shoe and shoe machinery industries and the magnitude of demands for machines for a given operation are such that a large number of competitors per machine operation is not economically feasible.

b) Since the decree the number of competing offerings of non-United equipment has expanded to such an extent as to bring about a marked reduction in United's percentage share of total offerings.

c) The response to the removal of artificial barriers to entry in the form of new offerings for particular machine operations, in the form of new companies, domestic and foreign, entering the industry, and in the form of older companies expanding the range of their offerings has been prompt, vigorous, and at a steadily increasing pace.

d) The new offerings of non-United equipment have been predominantly for the operations whose relative economic attractiveness has been high; United's competitors [fol. 1545] have tended to avoid the unattractive operations in which United was already offering new machines and second hand machines were available.

e) Even though the bulk of United's large number of competitors offer machines for only one or two operations, nevertheless the nature of the industry and the

continued existence of such companies attest to the viability of such competitors.

f) The differences in the patterns of number of competitors per machine offering are explained largely by the relative economic attractiveness of these various operations and are the expected patterns resulting from competitive forces not inhibited by artificial barriers.

g) The existence of alternative processes, sub-processes, and operations of shoemaking to any given operation reduced markedly the market power inherent in sole occupancy or occupancy by only a few suppliers of new machines for a particular operation.

h) The development of a widespread second hand mar- [fol. 1546] ket for United's machines has enlarged the number of alternative sources of machines open to shoe manufacturers, especially for those operations in which the number of suppliers of new machines is very small.

These conclusions in aggregate show the significant effect of the provisions of the decree in altering the nature and extent of competition in the shoe machinery industry and in enlarging substantially the alternative sources of machines open to shoe manufacturers. And the nature of the trends which are evident suggest that the competition which United will face, in the future, will be stronger than at the end of 1964.).

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[fol. 1591]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 7198

WYZANSKI, Ch. J.

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED SHOE MACHINERY CORPORATION, DEFENDANT

APPEARANCES:

Margaret H. Brass, Esq., and Robert J. Ludwig, Esq., and W. Randall Elliott, Esq., Attorneys for the Government.

Robert Proctor, Esq., Ralph M. Carson, Esq., Taggart Whipple, Esq., Louis L. Stanton, Esq., and Charles Gerlinger, Esq., Attorneys for the Defendant.

John Hally, Esq., Attorney for amicus curiae New England Shoe and Leather Association.

Court Room No. 6
Federal Building,
Boston, Massachusetts,
October 28, 1966

* * * *

[fol. 1592] BERTRAND FOX, Resumed

CROSS EXAMINATION

Q (By Miss Brass) * * *

* * * *

[fol. 1611] Q Now, Dr. Fox, isn't it a fact that when there is only one company in a particular field, that this is a very strong indication that the barriers of entry are high?

A It is a very strong indication that this is unattractive and perhaps the natural barriers are high. Certainly [fol. 1612] it has not attracted anyone else than the one person.

Q How do you know, Dr. Fox, that they are natural barriers and not artificial barriers as you defined it?

A I do not know as to any specific box. On the other hand, where I have observed data showing substantial numbers of entries in a variety of operations and the fact that they have gone into a very widespread number and variety of operations, and where I have noted that the entries have been concentrated in those operations where the attractiveness ratings—I am getting the attractiveness figures mixed up with low and high here.—I infer from this that there is an absence of artificial barriers because the entrants are taking place in what seems to me the natural response to competitive forces, and this is the kind of a pattern I would expect in a competitive market. Hence I infer the absence of artificial barriers from the nature of the entries that are taking place in this business.

* * * *

[fol. 1622] Q Thank you. Wouldn't it also be a factor in your decision whether or not the operation was attractive to you as a potential entrant if a dominant supplier [fol. 1623] had, let us say, 10 to 20 times the resources that you have?

A As I have tried to present here, our objective was to try to give a picture of this industry by operations in terms of the kind of machines that a manufacturer needs to perform certain functions.

These functions, or each of the functions is in a sense kind of separate, and the suppliers are trying to provide machines for that function, and the fact that there is a supplier who is very large and may be supplying a dozen other functions does not necessarily give him an advantage in supplying this particular function.

A supplier with much smaller resources may be the strongest competitor in this particular function, without any reference to work in other functions.

We can have, I think, in this business men offering machines, designing machines, producing machines for one function, two functions, three functions, and paying no attention to any of the others.

There are many of the producers in this business whose primary focus seems to be in another business but who are producing machines for one or two functions and [fol. 1624] competing very effectively in these functions.

* * * *

[fol. 1625] Q Thank you, sir.

Now, we have been talking about barriers to entry. Isn't it also true that when there is a dominant supplier in a particular field of operations that that dominant supplier might cut its price when a new entrant comes into that field, and that this would be a factor that, as a potential entrant, you would have to take into consideration?

A If this particular supplier, already in the business, is the sole supplier in that field, I think this is a possibility that you might have to take into account. If he is one of several, I think the opportunities, the possibilities of doing this are negligible.

* * * *

[fol. 1655] This business is not like the aluminum business or copper business where the product is essentially homogeneous. This is a business made up, you might say, almost of 187 separate sub-businesses where the individual firms that are involved in some way are—it is hard to say that some are competing against each other one. Some are competing against United; some are not; some are competing against each other; some are not. But I think here in my opinion one has to look at the various operations involved because here is where the buyer is facing his choices and we have to look at it there.

* * * *

[fol. 1679] Q Now in your opinion as an expert and an economist would you say that where there is one large company, which is many times larger than any of its competitors, that this would indicate that that company has market power?

A That amount of information by itself for this business would not lead me inevitably to that finding or that result. This is a business, and I cannot emphasize this strongly enough, the way I look at it, that in essence almost consists of 187 different businesses, and the real competition of substituting one machine for another is in these cells one after another.

The fact that one is in many cells or many of these sub-markets of operations, does not necessarily give it power in each of these individual machine operations.

* * * *

[fol. 1682] The WITNESS. No, sir. I believe that there is one market with a very large number of sub-markets, and that one cannot treat this as one market for a homogeneous product.

This is not like an aluminum market or a wheat market. It is this difference, I think, which is extremely important for this particular industry, and it is also terribly difficult to get appropriate measures for it.

* * * *

[fol. 1691]

REDIRECT EXAMINATION BY MR. WHIPPLE, * * *

* * * *

[fol. 1704] A Yes. I think I indicated the relationship between the total number of offerings which were then being made and the average number of suppliers of new machines and the number of operations and I said the arithmetical consequence was either a very small number of wide-line companies or a sizeable number of companies with quite narrow lines of machines or some combination of the two. It is possible to amplify it to have more than one wide-line company.

What I am not sure of is how many wide-line companies, whether you can add one and still have the same number of offerings by the suppliers who are offering machines for one or two operations at the moment. The crux of the thing is the situation in the individual operations and, as I have indicated, I don't think that some

of the machine operations can support an additional number of suppliers so that if you had an additional wide-line supplier, you might very well have a decrease in the number of narrow-line suppliers.

THE COURT: You are saying if I follow the Government's suggestion of breaking United into three parts, I might be driving competitors out of the market?

THE WITNESS: This is my belief, sir.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 7198

UNITED STATES OF AMERICA

v.

UNITED SHOE MACHINERY CORPORATION

OPINION

April 11, 1967

WYZANSKI, *Chief Judge:* The Government and United Shoe Machinery Corporation have each filed a petition for modification of this Court's decree of February 18, 1953, affirmed by the Supreme Court of the United States May 17, 1954, and subsequently modified July 12 and September 17, 1954. See *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass.), aff'd. *United Shoe Machinery Corp.* v. *United States*, 347 U.S. 521.

The Government's petition seeks to have United dissolved into two companies. United seeks to have the restrictions now imposed limited to requirements of sale of any machine types offered for lease, maintenance of a reasonable commercial relationship between sale terms and lease terms, separate charges for service, and avoidance of restrictive clauses such as the full capacity clause. Both petitions rely upon the following language in paragraph 18 of the decree:

> "On C Day [December 23, 1964] both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market."

Threshold questions are what is the scope of this Court's power in these proceedings, what standards are to be applied in the exercise of this power, and what issues are before this Court. With respect to the first two questions an authoritative answer is given by *United States* v. *Swift & Co.*, 286 U.S. 106. A court can modify a continuing injunction not on the basis of conditions that existed at its making, but only on the basis of new and unforeseen conditions. Moreover, the court should require a clear showing of grievous wrong. In *Swift*, where the Supreme Court denied a defendant's application to have a decree modified, it enunciated the criteria in the following words (286 U.S. at p. 119) applicable *mutatis mutandis* to a plaintiff's application:

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

Swift has been followed consistently. *Morse-Starrett Products Co.* v. *Steccone*, 205 F. 2d 244 (9th Cir.); *Bigelow* v. *Twentieth Century-Fox Film Corp.*, 183 F. 2d 60 (7th Cir.); *United States* v. *Lucky Lager Brewing Co. of San Francisco*, 209 F. Supp. 665 (D. Utah).

Nothing in paragraph 18 of the decree departs from *Swift's* teaching or purports to confer upon this Court a broader power to alter its decree, or authority to apply different standards. The requirements remain (1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions. Indeed if paragraph 18 gave this Court the power to alter a decree on any lesser showing the decree would not have been final and appealable to the Supreme Court.

What paragraph 18 does is to direct the parties to an issue: the decree's "effect in establishing workable competition." The phrase was unfortunate because it has no precise legal meaning. But if paragraph 18 be read against the accompanying opinion, *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, it is apparent that what the Court was inviting was information as to how successful the decree had been in gradually eroding United's 1953 power to monopolize the market. The opinion makes it plain that the object of the decree was during a ten year period not to restore so-called workable competition but to move toward establishing it.

The issue now raised requires that this Court first state what it knew at the time of the decree and what it then chose.

The following were among the facts of which this Court was aware in 1953. United had by far the largest financial and patent resources in the shoe machinery industry. It was the only company that offered a wide line of machine types. If United were allowed to continue leasing, even on a basis that gave shoe factories an alternative to purchase the leased machine at an equivalent price, almost all shoe factories would prefer to lease their new and more complicated machines. That preference would enable United to continue its visits to most shoe factories. It would permit United to place machines on lease on an experimental basis. It would make it difficult for any competitor to succeed in connection with the marketing of complicated expensive types of machinery for which there was a thin market unless the competitor had resources adequate to offer a long line of machine types, to accept compensation in the deferred form of rental pay-

ments, to make its lease terms the commercial equivalent of its sale terms, and to withstand the at least temporary inconvenience of having leased machines returned after a short rental period. In short, this Court was quite cognizant of the fact that permitting United to continue as a single enterprise engaged predominantly in leasing rather than selling made it almost certain that at the end of a decade, absent a strong outside challenger, United's market power would be merely diminished not destroyed.

Yet this Court chose not to dissolve United, and not to prohibit leasing, but merely to purge the leases of certain specific restrictive clauses, to require United to offer lessees the alternative of purchasing, and to require United to take certain miscellaneous steps which need not now be recited. Among the reasons that this Court made this choice were that the Supreme Court had approved the constitution of United as a single enterprise, that it had permitted United to proceed with leasing as an exclusive method of distributing machines, that United had engaged in no predatory or immoral practices, and that United owed much of its position to superior products and services, to its own inventions, and to other results of United's skill, ability, and efficiency.

Both parties have submitted requests for findings. They have been helpful in directing this Court's attention to what the decree has accomplished, to what are the dynamics of the 1963-1964 [hereafter sometimes called "the present"] shoe machinery market, to the freedom of choice now enjoyed by the shoe factory users of shoe machinery, and to the freedom of competitors in the present market structure. But those topics need not be covered by this Court in detail and hence, so far as not granted herein, all requests for findings are denied.

Paragraph 18 of the decree by referring to affidavits indicated that this would be a summary proceeding. It is important not to plague anti-trust law by establishing a precedent which might lead to full scale second trials of anti-trust cases on every claim that, as shown by its effects, an outstanding decree was too lenient or too severe. The only findings which this Court deems appropriate and necessary follow in numbered paragraphs.

1. United complied fully with this Court's decree.

2. Before the 1953 decree United's share of the shoe machinery market by any measure was about 85 per cent. While in 1953 there was no specific finding with respect to United's then share of the revenue from shoe machinery sold and leased, it is a fair inference that, because of its strong position in the distribution of major machines yielding the largest revenue, United's share of the total revenue exceeded 85 per cent. In 1963 it had declined to about 62 per cent of the current shoe machinery market.

3. That market now includes machines for the manufacture of vulcanized rubber because such machines are competitive with injection moulding machines and other shoe machinery, are used in conventional shoe factories, and are used for both leather-upper and fabric-upper footwear.

4. The aforesaid revenue percentage of the shoe machinery market is a far more satisfactory index of share of the market than any other suggested. That index is far more illuminating than one based on a mere count of machines in position in shoe factories without distinguishing the machines by type, or value, or yield. It is also more satisfactory than one based on the value of annual shipments, an index which disregards the payment of rentals upon or conversion prices for machines shipped in previous years. It is a better index than one computed by the use of tables with 30 classifications according to the major and minor shoe machinery processes of the pre-1953 decree period, and referred to in the 1953 opinion, 110 F. Supp. at pages 304-305, 306. Those classifications do not reflect the extent to which technological changes require that there be grouped in two over-all classifications the machines used in competitive processes for (a) lasting and (b) sole attaching. Moreover, insofar as a tabular presentation is applied to machines in position in shoe factories in 1963 it fails to recognize that, unlike the situation in 1953, machines of United origin, not necessarily being on lease, are not necessarily sources of current payments by shoe factories and are not part of the current market.

5. There are many indicia confirming the correctness of the conclusion derived from the revenue index that United has about three-fifths to two-thirds of the shoe machinery market now, that is, a shrinkage of more than a quarter of the share of the market it had in 1953. (a) Although during the last decade the number of shoes produced annually rose, and therefore it may be inferred that the value of shoe machinery in the shoe factories rose, and although the value of the dollar declined, nonetheless United's total annual revenues from shoe machines sold and leased, from the sale of parts, and from repair services in 1955 was certainly less than before the decree. Indeed the combined lease and sale figures for United shrank from $32 million in 1955 to $24 million in 1963. During the same 1955-1963 period United's 12 most important domestic competitors doubled their gross revenues. (b) United's decline in annual earnings before taxes of the Shoe Industry Group, after elimination of proceeds from conversion sales, had dropped from over $11 million at the time the decree became effective to less than $6 million at February 29, 1964. (c) United's employment declined approximately 30 per cent in its Beverly plant and 40% in its service branch. (d) Of the machines shipped in 1963 in the 30 classifications shown in the tables used in 1953, United supplied 51.7 per cent, which is a figure combining 65 per cent of so-called major machines and 42.3 per cent of minor machines. (e) Of the machines now in shoe factories about 54 per cent were of United origin, but only 47 per cent were being leased from or had been bought from United.

6. Since the decree the number of United shoe machines on lease in domestic shoe factories fell from 91 to 26 thousand. Of the machines in domestic shoe factories only 17 per cent in 1963 were on lease from United. While approximately 90 per cent of the machines shipped by United in the post-decree decade have been on lease, a substantial number of them are ultimately bought by shoe factories. The reasons that most shoe factories initially lease rather than buy machines of the expensive types are not because the lease terms are not commercially related to sale terms, but because shoe-makers prefer to

have the right easily to dispose of expensive machines and because they lack either the financial ability or the inclination to invest substantial capital in shoe machinery. The continuation of the pattern of leasing expensive machines is a response to the demand from the shoe-making market which has 785 enterprises, many of them of modest resources. Without leases many of them could not continue in business.

7. The decree has tended to open the market by promoting the return of United machines by customers. For example, the total returns to United by customers of so-called major machines exceeded the total shipments by more than one-third during 1955-1964. This trend promotes competition by making the shoe factory a more frequent customer for shoe machinery.

8. In the decade 1953-1963 shoe factories purchased over 53,000 machines which they had previously leased from United. Most of the conversions occurred soon after the decree. But in the tenth year over 1300 machines were converted, and in 1964 the number was 678, which was more than one quarter of the machines United leased that year. Each purchase reduces United's power by making it likely that the machine will utimately enter the second-hand market.

9. United has faced important competition from an active second-hand market, largely of its own machines. In 1963 that market sold about $3 million in machines, which stands comparison with United's revenues of $22 million from leases and $1.6 million from sales. The second-hand market is sufficiently vigorous so that it is not unusual now for shoe factories to start in business utilizing many machines originally of United manufacture, without obtaining a single machine from United.

10. At the end of 1955-1964 period there were about 126 suppliers of new shoe machines. The pace of entry into the market in each three-year period after the decree increased: from 11 to 19 to 26, or a total of 56 companies. None of these, however, is a company offering a wide line. Indeed while United offered 115 types of machines on current terms and 24 types on application, Compo Shoe Machinery Corporation offered only 22, In-

ternational Shoe Machine Corporation only 5, and most companies only 1. The small companies have shown that in many sectors of the industry a machine manufacturer can be effective in one or several parts of the industry without the need of participating in other parts.

11. The unanimous and representative testimony of shoe makers is that there now exists in the shoe machinery market sufficient competition to allow the shoe manufacturers to select machinery as they wish on the merits of the machines available and in accordance with the processes they select to meet the various style changes in the consumers' market. In particular, United is subject to constant full and free competition from competitors' machines in toe lasting, side lasting, sole attaching, pulling over, and bottoming. That kind of competition reveals that several of the 18 sub-classifications of "major machines" are in competition with one another and that percentage calculations based upon each separate classification are misleading unless machines which are in competition with one another are grouped together, thus reflecting the true character of the shoe machinery market.

12. In 1953 United had and exercised power to exclude competitors from every significant classification of shoe machinery except cement sole attaching machines.

13. However, by 1963 United was not in fact exercising, and indeed was incapable of exercising, exclusionary power over the entire market. This is shown not merely by its reduced share of the market, by its altered leases, and by the growth of competition from domestic manufacturers, importers, and second-hand machinery but by the following miscellaneous indicia.

(a) With respect to the lasting and sole attaching sectors of the market cement processing, injection molding, and direct-mold vulcanizing had become competitive with the seven older techniques,—McKay, Nail, Turn, Goodyear Welt, Stitchdown, Prewelt, and Lockstitch. Those older techniques, where United offered over 90 per cent of the machine types, declined from 55 per cent of the relevant sub-market in 1950, to 42 per cent in 1955, to 33⅓ per cent in 1963. In the newer techniques, United

does not hold a commanding position. The result has been that United cannot control competition in the lasting sector as a whole or in the sole attaching sector as a whole.

(b) Of the shoe machines in position in shoe factories only 51 per cent had been shipped by United and only 17 per cent were covered by United leases. That finding, as already noted, does not show United's share of the entire market. But, inasmuch as from other evidence it appears that United's share of so-called major machines is far higher than its share of minor machines, it follows that in minor machines as a whole, and probably in most categories of minor machines, United has no exclusionary power.

(c) Of the shoe machines shipped in 1963, United's share by value may be as little as 48 per cent, and certainly is not much over 50 per cent. Here again, that finding, as already noted, does not show United's share of the entire market, because it eliminates current revenues from machines shipped in earlier years. But, in view of other evidence indicating that United's share of so-called major machines is far higher than its share of minor machines, it follows that in minor machines as a whole, and probably in most categories of minor machines, United has no exclusionary power.

14. In 1963 there were certain sectors of the shoe machinery market in which United was without significant competition, but it does not follow that United's position in those sectors was a result of United's exclusionary power or made competition unworkable. Indeed, it is more reasonable to conclude that the want of competition was due to the absence of a challenger of adequate, but not unusual, financial resources, skill, ability, and efficiency.

15. In almost every one of the 45 of the 187 operations in domestic shoe factories where United was the sole source of supply fewer than 6 machines a year are demanded and the operation, looked at alone, is not economically attractive. What is far more important, the operation is shown to be competitive with other operations for which other sources than United supply machines. On

this record, it is inferrable that, for the purpose of the anti-trust acts, the machines used in the 187 operations ought to be combined to constitute perhaps as few as 7 markets, one for each stage of shoemaking. It is not clear whether after that was done United would have a dominant position in some of the sub-markets thus constituted.

16. If United does have a dominance in some of those sub-markets such dominance is not due to "restraints of trade" in the technical sense. There is a variety of causative factors such as United's financial capacity to offer lease terms commercially equivalent to sales terms on the same machine types, United's broad line of machine products manufactured in one plant (which permits United with economic advantage to supply machine types for which there is a small annual market and which also permits United to set for different types of machines terms which reflect different rates of profitability), United's constant contacts with most shoe manufacturers as a result of the large volume of machines United ships annually and the large number of leases it has outstanding, and United's excellent products, superior skill in merchandising, efficiency in administration, inventions and know-how. Every one of those factors was known to this Court when it entered its decree in 1953. New information with respect to the operation of those factors since 1953 shows that they have not individually or collectively had an unforeseen effect or worked a grievous wrong.

From the foregoing findings of fact this Court concludes that the 1953 decree has operated in the manner and with the effect intended. It has put in motion forces which, aided by new technology, have eroded United's power and already dissipated much of the effect of United's monopolization.

In some sectors of the market, competition is already flourishing. In the sectors where it is not flourishing, all artificial barriers have disappeared and the position enjoyed by United is chiefly traceable to the fact that it has not yet been challenged by a competitor of financial resources of any magnitude. United follows no practice

and enjoys no significant advantage which could preclude or restrain competition by an enterprise of a size comparable with leading machinery companies in other industries, that is, with resources adequate to offer lease terms commercially equivalent to sale terms and to offer simultaneously machine types in several categories where the annual demand is too thin to be economically supplied separately. The apparent reason why no such competitor has appeared is that compared with rates of return in other machinery markets, the rate of return in the shoe machinery market is unattractive.

It cannot rightly be said that a market or a sector thereof is, in the legal sense, not open to competition where an effective challenge may be made by an enterprise of resources common in comparable fields.

While this Court now has before it the facts of the decade 1954-1963 which were not known in 1953, nothing new, aside from the updating of the data, is involved. United has not created new barriers. In 1953 the resources of United in absolute terms were substantially the same as, and in comparative terms substantially less than, they are now.

It may have been an error in 1953 not to have dissolved United rather than to allow sectors of its power to be dissipated by small competitors, and to leave other sectors of power to be effectively attacked only when a small competitor became large or a large competitor appeared. But the choice was made in 1953 for reasons already adequately explained.

What the Government is complaining of is not that the decree did not work as expected, but that working in the foreseeable and intended way the decree did not accomplish what the Government had originally prayed for and what this Court had rejected. In short, the Government petitions that the decree be reversed because this Court erred in 1953. On the authority of the *United States* v. *Swift & Co.*, 286 U.S. 106, 119, the Government's petition is denied.

United's petition stands no better. United wants to adjust the decree on the ground that the purposes of the decree have been accomplished and milder restraints are

now in order. But the premise is unsound. The decree is still working at its long-range task of freeing the market from all consequences of United's monopolization and keeping the door wide open for the arrival of an adequately provided challenger. Until there are competitors throughout the market, the decree should stand unmodified. United's petition is also denied.

Before concluding, this Court expresses its appreciation of the brief filed by *amici curiae*, the National Footwear Manufacturers Association and the New England Footwear Association. Their analysis of this case has greatly influenced this opinion. Their assurance that their clients, who represent substantially all the shoe manufacturers, who are among the chief intended beneficiaries of this Court's decree and who have had an unequalled opportunity daily to observe its effects in the last decade, are content with its operation and do not want it modified, gives added ground for leaving the decree undisturbed.

Petitions denied.

CHARLES E. WYZANSKI, Jr.,
Chief Judge.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 7198

UNITED STATES OF AMERICA

v.

UNITED SHOE MACHINERY CORPORATION

ORDER

April 11, 1967

WYZANSKI, *Chief Judge:* In accordance with the opinion filed this day, the petition of United Shoe Machinery Corporation and the petition of the United States, each seeking modification of the decree herein, are severally denied.

CHARLES E. WYZANSKI, Jr.,
Chief Judge.

SUPREME COURT OF THE UNITED STATES

No. 597, October Term, 1967

UNITED STATES, APPELLANT

v.

UNITED SHOE MACHINERY CORPORATION

APPEAL from the United States District Court for the District of Massachusetts.

The statement of jurisdiction having been submitted and considered by the Court, probable jurisdiction is noted.

December 4, 1967

Mr. Justice Marshall took no part in the consideration or decision of this case.

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SUPREME COURT, U. S.
SEP 8
JOHN F. DAVIS, CLERK

No. 597

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED SHOE MACHINERY CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED SHOE MACHINERY CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion and order of the district court denying the government's petition for modification (App. A, *infra,* pp. 25–39) is reported at 266 F. Supp. 328. The original opinion and decree of the district court is reported at 110 F. Supp. 295, and the *per curiam* opinion of this Court affirming that decree is reported at 347 U.S. 521.

JURISDICTION

The order of the district court was entered on April 11, 1967. The United States filed a notice of appeal on June 9, 1967. By order dated August 7, 1967, the lower court extended the time for docketing the ap-

peal to September 8, 1967. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *Brown Shoe Co.* v. *United States,* 370 U.S. 294; *United States* v. *E. I. duPont de Nemours & Co.,* 366 U.S. 316.

QUESTION PRESENTED

In a government civil action brought under the Sherman Act, the district court in 1953 entered a decree, which this Court affirmed, to remedy United Shoe Machinery Corporation's 85-percent monopoly of the shoe machinery industry. A paragraph of that decree expressly directed the parties to report in ten years on the effect of the decree, and authorized them to petition for its modification in view of its effect in establishing workable competition in the industry. Under this provision the government showed that, as of 1964, the shoe machinery industry still had a monopolistic structure in which United's market share is more than 60 percent, and petitioned for further relief to dissipate United's monopoly. The district court, relying on *United States* v. *Swift & Co.,* 286 U.S. 106, denied the petition on the grounds that the decree was working as originally contemplated and that the government had not clearly shown grievous wrong evoked by new and unforeseen circumstances. The question presented is whether the district court's decision was based upon an erroneous standard for determining when the government is entitled to further relief in Sherman Act cases, particularly since

the original decree specifically contemplated future judicial consideration of its effectiveness.

STATUTE INVOLVED

Sections 2 and 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 2, 4, provide in pertinent part:

> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.
>
> * * * * *
>
> Section 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 of this title * * *.

STATEMENT

This is a direct appeal from an order of the district court denying the government's petition to modify the decree entered in 1953 against the United Shoe Machinery Corp. ("United"). That decree was grounded upon a determination that United had violated Section 2 of the Sherman Act by monopolizing the manufacture of shoe machinery and certain lines of shoe factory supplies. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, affirmed, 347 U.S. 521. The decree (110 F. Supp. at 351–354; set out, as modified, in App. B, *infra.*, pp. 41–49) provided specific remedies relating to United's leasing of shoe machines, including a requirement that it offer for sale

any machine it leases, required United to license the patents it then held on a reasonable royalty basis, limited United's power to make future acquisitions, and granted certain other relief.

Paragraph 18 of the decree provided that, ten years after its entry,

> * * * both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market. [110 F. Supp. at 354; App. B, p. 48.]

On January 1, 1965, the United States reported that workable competition had not been established in the shoe machinery industry and petitioned for additional relief. United cross-petitioned to be relieved from certain restrictions of the decree. On April 11, 1967, the district court denied both petitions (App. A, p. 39).[1]

I. THE UNDERLYING FACTS

A. UNITED SHOE MACHINERY CORP.

United is the largest manufacturer of shoe machinery in the world, and has been the dominant factor in the United States shoe machinery market since 1899, when its corporate predecessor was created as an agglomeration of most of the significant American manufacturers of shoe machinery (110 F. Supp. at

[1] United has not appealed from the denial of its cross-petition.

299–300). Its market dominance was preserved by a series of acquisitions and mergers (110 F. Supp. at 312).[2] In 1950 it was primarily a manufacturer of shoe machinery and shoe supplies, with assets of about $105 million; its 1946–1950 earnings after taxes ranged between $6.2 million and $8.8 million (110 F. Supp. at 300). By 1964 it had become a diversified company operating domestically and internationally through some 66 subsidiaries and affiliates which serve general industrial and consumer markets, as well as the footwear industry, in the United States and overseas. 1965 Moody's *Industrial Manual* 1200–1203. As of 1964, its assets totalled $232.5 million (*id.* at 1202), and its gross operating income from all sources was $208.7 million (*id.* at 1201). Sixty-two percent of its domestic revenues came from the footwear industry, from which it received income of some $59.2 million.[3] In addition to shoe machinery it also produces chemi-

[2] See also *United States* v. *United Shoe Machinery Co. of New Jersey*, 247 U.S. 32; *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451.

[3] The following table shows the principal sources of the company's total revenues in each of its past five fiscal years from the footwear industry and from general industries in terms of millions of dollars, and is derived from a preliminary prospectus, dated May 23, 1967, for $25,000,000 United Shoe Machinery Corp. sinking fund debentures (p. 5).

	1967	1966	1965	1964	1963
Domestic					
Footwear	$61.5 46%	$62.6 54%	$61.0 59%	$59.2 62%	$60.8 67%
General	73.1 54%	53.8 46%	42.5 41%	36.7 38%	30.6 33%
Total	$134.6	$116.4	$103.5	$95.9	$91.4
International					
Footwear	$77.7 52%	$73.5 55%	$72.3 58%	$67.5 60%	$65.6 62%
General	71.2 48%	60.8 45%	53.3 42%	45.2 40%	41.0 38%
Total	$148.9	$134.3	$125.6	$112.7	$106.6
Domestic and International					
Footwear	$139.2 49%	$136.1 54%	$133.3 58%	$126.7 61%	$126.4 64%
General	144.3 51%	114.6 46%	95.8 42%	81.9 39%	71.6 36%
Total	$283.5	$250.7	$229.1	$208.6	$198.0

cals, industrial adhesives, sealants and coatings, fasteners, shoe boxes, box-making machines, brushes, and customer-specified metal and plastic products.

B. THE STRUCTURE OF THE SHOE MACHINERY INDUSTRY AFTER THE DECREE

The relevant product market, as defined in the original opinion (110 F. Supp. at 302–303), included all shoe machines except dry-thread sewing and other machines not then offered by United. In this proceeding it was expanded to include vulcanizing machines, which the court found to compete with newly developed injection-molding machines as a method of attaching soles. (App. A, finding 3, p. 30.) The relevant geographic market is the entire United States.

In 1953 United's share of the shoe machinery market by any measure was about 85 percent (App. A, finding 2, pp. 29–30). The decree began operating in 1955 (App. B, p. 41). The government's evidence showed that, as of 1963, there were approximately 100 firms in the shoe machinery industry including 66 manufacturers (Pl. Exh. 69, App. A to P.P.T., Tr. 539),* 12 importers (Pl. Exh. 71, App. D to P.P.T., Tr. 546), and 22 second-hand dealers (Pl. Exh. 72, App. G to P.P.T., Tr. 551). Total industry revenues derived from the lease and sale of shoe machinery were $41.5 million (Pl. Exh. 73, App. E to P.P.T., Tr. 552). United's share was $25.8 million, consisting of $3.4 mil-

* "P.P.T." refers to Plaintiff's Post-Trial Brief. A number of the government's exhibits were reprinted as appendices to that brief, a copy of which is on file with the Clerk of this Court. The "Tr." reference is to where the exhibit was admitted into evidence. See note 5, *infra*.

lion in sales and $22.3 million in lease revenues, or 62.2 percent (Pl. Exh. 69, *supra*). United's largest competitor, International Shoe Machine Corp., had total revenues of $3.9 million; the next largest, Compo Shoe Machinery Corp., had revenues of about $3 million (Pl. Exh. 69, *supra*). No other manufacturers had sales in excess of $1 million, and only 16 had revenues in excess of $100,000 (Pl. Exh. 69, *supra*). The remaining 49 manufacturers were quite small. Of the 12 importers, whose combined revenues were only slightly over $1 million, only four had revenues in excess of $100,000 (Pl. Exh. 71, *supra*). The 22 second-hand dealers' total revenues were $3.4 million, but only one, Plymouth Machinery Company, had revenues in excess of $1 million, and only five others in excess of $100,000 (Pl. Exh. 72, *supra*). And there was evidence that because of the shoemakers' preference for leasing (App. A, finding 6, p. 32), the supply of used machines to the second-hand market is dwindling (Pl. Exh. 68, 74, Tr. 538, Tr. 557; see also Tr. 258).[5]

In its original opinion, the district court determined United's market position from a survey of percent-

[5] "Tr." refers to the transcript of proceedings in the district court, begun on October 17, 1966. "Pl. Exh." refers to exhibits introduced by the government in the proceedings below. Some of them were reprinted as part of the government's Post-Trial Brief (see note 4, *supra*), which is included as part of the certified record which is on file with the Clerk of this Court, as is the transcript of proceedings. Those exhibits not reprinted in the Post-Trial Brief were inadvertently omitted from the record originally certified, and are now being forwarded to the Clerk of this Court for inclusion in the certified record.

age shares of outstanding machines (110 F. Supp. at 303–307). In 1963, United accounted for approximately 84 percent of the 18 major machines listed in the original decree (Pl. Exh. 50, Tr. 350).[6] It shipped 65 percent of all major machines to shoe factories (Pl. Exh. 64, Tr. 388), and seven times as many machines of all types as its next largest competitor (Pl. Exh. 63, Tr. 388). It offered 115 machine types while its largest competitor offered only 22, and most offered far fewer (App. A, finding 10, p. 33). There is no evidence of the development of any significant potential competitor (App. A, pp. 35, 37), and United is the only company in the market manufacturing and offering a broad line of shoe machines (App. A, finding 10, p. 33). No independent shoe-machinery repair company has come into being since 1955 (Tr. 577).[7]

II. PROCEEDINGS IN THE COURT BELOW

A. THE PRE-TRIAL ORDER

After the filing of the cross-petitions for modification, the district court on July 19, 1965, entered a pre-trial order specifying that the issues in the hearing

[6] United, according to its own sample, accounts for 100 percent of the injection-molding machines used in this country (Def. Exh. 60A, Tr. 1741). Injection molding is a new process of great commercial significance which substantially developed after the entry of the original decree (Tr. 89–90, 93; Pl. Exh. 29, Tr. 105).

[7] United asserted that a sampling of the number of machines in manufacturers' inventories showed its market position to be between 52 and 57 percent and that there were no artificial barriers to entry into the industry. It also attempted

would be confined to certain matters which the court considered appropriate for updating factual information previously available.[8] No other evidence was to be presented except as the court might specifically order. It expressly declined to consider any question of relief, stating that "[i]t is * * * inappropriate as of this time to offer any suggested program of divestiture, which if considered later in the hearings certainly will require a conclusive showing of failure of the decree, as now operative, to have effected the goals originally contemplated." Discovery and the evidence at the hearing were limited to the scope of the pre-

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to show, by a comparison of the revenue positions of 12 selected companies, that competition had been intensified because its total shoe machinery revenues had declined from $32.3 million in 1955 to $24 million in 1963, while its competitors' revenues had increased from $3.5 million in 1955 to $8.8 million in 1963 (see note 13, *infra*).

[8] The information included a census of machines, broken down into United and non-United machine types in the continental United States as of January 1, 1955, and January 1, 1965; general trends explaining any changes shown in the 10-year period; a comparison of the second-hand market at the beginning and end of the 10-year period; a description of changes in domestic shoe machinery demand and in the number and types of United and non-United equipment available; domestic shipments during 1964 for sale and lease by United, its domestic competitors and its foreign competitors, broken down by machine types; a general statement of net worth as of January 1965, annual net income as of 1963 or 1964, number of employees as of 1965, and machine types offered as of 1965, as to United and its domestic and its foreign competitors; a description of the effect of the decree on installation, construction, repair and other services; and a general description of significant developments during the last decade relating to shoe machinery patents, licensing, and challenges to patent validity or enforcement against infringers.

trial order.[9] Thus, the district court restricted its consideration to whether any modification of the decree was required. Only if the court determined that some additional relief was necessary would it allow evidence relating to what sort of further relief would be appropriate. In light of its decision on the first question (*infra*, pp. 11–12), it never reached the second issue.

B. THE DISTRICT COURT'S DECISION

After an extensive hearing, the district court entered its order denying the petition (App. A, p. 39). Citing *United States* v. *Swift & Co.*, 286 U.S. 106, it stated that its original decree could not be changed unless the government made (1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions (App. A, p. 26). It found that Paragraph 18 of the decree contemplated nothing more than the application of this standard, and conferred no "broader power" on the court "to alter its decree" (App. A, p. 27). The statement in Paragraph 18 that the decree should be evaluated in light of its "effect in establishing workable competition," the court said, "was unfortunate because it has no precise legal meaning" (*ibid.*). When read, however, in light of the original opinion, the court stated, "the object of the decree was, during a ten year period, *not to restore* so-called workable competition *but to move toward* establishing it" (App. A, pp. 27–28) (emphasis added). Therefore, "what the court was inviting [in para-

[9] However, the court permitted the government to introduce certain revenue figures as relevant to market shares. (Pl. Exhs. 69, 71, 72, 73; see *supra*, pp. 6–7.)

graph 18] was information as to how successful the decree had been in gradually eroding United's 1953 power to monopolize the market" (App. A, p. 27). When it entered its original decree, the court said, it "was quite cognizant of the fact that permitting United to continue as a single enterprise engaged predominantly in leasing rather than selling made it almost certain that at the end of a decade, absent a strong outside challenger, United's market power would be merely diminished not destroyed" (App. A, p. 28).

The district court made 16 findings of fact from which it concluded that its decree was working as it had contemplated. It found that United now received 62 percent of total shoe machinery revenues as against 85 percent prior to the decree (App. A, finding 2, pp. 29–30), and that United's overall market position ranged between three-fifths and two-thirds, roughly 25 percent less than the share (85 percent) it enjoyed in 1953 (App. A, finding 5, p. 31). It viewed this shrinkage as satisfactory in light of findings as to the growth of United's competitors, total shipments, machines on lease, the condition of the second-hand market, and the entry of the new narrow-line companies. It found that United had no exclusionary power over minor machines (App. A, finding 13(c), p. 35), and that if the shoe machinery industry were divided into seven sub-markets corresponding to the seven stages of shoemaking (a definition developed by the court after the record closed), it was not clear that United had a dominant position (App. A, finding 15, pp. 35–36). Even if it did, the court found, this was not due to restraints of trade but to United's

large volume, wide contacts, superior products, skill in merchandising, efficiency, inventions, and know-how (App. A, finding 16, p. 36).

On the basis of comparisons of sales and lease revenues between 1953 and 1963, and numbers of machines sold and leased, and the fact that its competitors were growing, the court found that United's position in the market was declining (App. A, pp. 36–37). All artificial barriers to entry had been terminated, it declared, and if competition was not flourishing in some sectors it was because no competitor with large financial resources had entered the market (App. A, p. 37). And this was because, it found, the rate of return on shoe machinery is unattractive as compared with other machinery markets (*ibid*).

Thus, the district court determined that the decree "has operated in the manner and with the effect intended" (App. A, p. 36), and is "still working at its long-range task of freeing the market" from United's monopolization and keeping the door open for "an adequately provided challenger" (App. A, p. 38). "Until there are competitors throughout the market," the court concluded, "the decree should stand unmodified" (*ibid.*).

THE QUESTION IS SUBSTANTIAL

1. *The district court applied an erroneous standard in determining whether the government was entitled to further relief.* The decision below adopts a criterion for further relief under antitrust decrees which departs from established principles and threatens effective antitrust enforcement. This Court has frequently observed that formulating effective relief is

the most important aspect of an antitrust case, for the litigation "has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it." *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 323; see *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88. The standard for relief in cases under Section 2 of the Sherman Act is clear. "[A]dequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577; see also *International Salt Co.* v. *United States*, 332 U.S. 392, 401. This principle seemingly was followed and relied upon by the district court in its 1953 opinion and decree (see 110 F. Supp. at 346–347), a decision which this Court subsequently affirmed (347 U.S. 521).

Indeed, although the 1953 decree was quite moderate in its terms, the government did not challenge its adequacy on appeal. There was no sound reason for it to have done so, however. The district court had expressly recognized that the principal object of its decree—and indeed of any decree in a Section 2 case—was to eliminate United's monopoly and restore competition in the shoe machinery market (110 F. Supp. at 346–347). Moreover, in Paragraph 18, it had made specific provision for re-examination and reconsideration of its decree after ten years' experience. If the decree proved inadequate to break up United's monopoly or render it impotent, the lower court could reasonably be expected,

under this provision, to take the measures necessary for further relief. See *Associated Press* v. *United States,* 326 U.S. 1, 22–23. Thus, in discussing the relief aspects of the case the government—correctly—advised this Court in its brief on the merits of the first appeal that the district court had "proceeded on the premise that relatively mild remedies should be tried as a first resort, and that the possibility of more drastic measures should be held in abeyance." Brief for the United States, No. 394, 1953 Term, pp. 154–155.

The district court's ruling here, however, departs from the standards for adequate relief originally applied by it and upheld by this Court. Paragraph 18 of the decree expressly provided for a determination after ten years of the decree's "effect in establishing workable competition." But ten years later the court applied a different standard—not whether the decree had done so, but how successful it had been in *gradually eroding* United's 1953 power to monopolize the market. It thus changed the test for determining the decree's effectiveness from whether the decree had worked to whether it was in the process of working. For the promise of a more drastic remedy if the moderate relief of the original decree proved ineffective, it substituted acquiescence in an indefinite continuation of an industry structure which remains monopolistic (see the discussion *infra,* pp. 18–31). Had the government known in 1953 that Paragraph 18 would be so construed, it might well itself have appealed on the adequacy of relief, and, in such circumstances, it appears doubtful that this Court would have so read-

ily affirmed, at least without discussing the scope of the decree.

The district court's error in the instant proceeding arose from its determination that *United States* v. *Swift & Co.*, 286 U.S. 106, controlled, and its consequent holding that the government was entitled to additional relief to dissipate United's monopoly only if it made "a clear showing of * * * grievous wrong * * * evoked by new and unforeseen conditions" (App. A, p. 27). We submit, however, that *Swift* is inapplicable in any antitrust case in which the government as prevailing party invokes the lower court's continuing jurisdiction to order further relief on the ground that the original decree has not been effective in restoring competition after a reasonable time.

In *Swift* defendants who had consented to a decree designed to eradicate monopolization sought a substantial narrowing of its prohibitions. This Court held that, on defendants' application for modification in such circumstances, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned" (286 U.S. at 119). In contrast, by applying for modification here the government as prevailing party is simply seeking to vindicate the underlying purpose of the antitrust laws—restoration of effective competition to a market in which it has been foreclosed by a violation. The *Swift* opinion recognized this, for the Court carefully distinguished between injunctions that protect rights accrued upon permanent facts, "and

those that involve the supervision of changing conduct or conditions and are thus provisional and tentative" (*id.* at 114), and went on to note that whether a decree may be changed depends upon the interest it is intended to protect (*id.* at 117–118).

Since an antitrust decree is intended to protect the public interest, the proper test for determining whether further relief is appropriate is not whether some unforeseeable turn of events has clearly rendered the original decree wholly ineffective, but whether modification is necessary because the original decree has not cured the violation. This distinction between the government's right to modification and that of an antitrust defendant is no more than an application of the familiar principle that "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 552.[10]

If the stringent *Swift* standard for antitrust defendants seeking modification of consent decrees is applied to the government, a district court may, in the absence of an extraordinary change of circumstances, simply adhere to its original relief instead of considering whether the decree has in fact restored competition after a reasonable time (see *supra,* pp. 14–15). This would almost invariably, as a practical matter, reduce the most crucial aspect of antitrust litigation—relief—to one-shot guesswork. Even though the court's first attempt at relief proved unsuccessful, or

[10] See also Note, 80 Harv. L. Rev. 1303, 1311–1314.

less than completely successful, the public would be forced to suffer the anti-competitive consequences, thus substantially frustrating the purpose of the original suit, and significantly impairing effective enforcement of the antitrust laws.

The district courts have a special responsibility for avoiding such pitfalls by providing effective relief (*United States* v. *E. I. duPont de Nemours & Co.*, at 322–323), and this necessarily includes the obligation to modify their decrees to ensure accomplishment of this purpose. *Chrysler Corp.* v. *United States,* 316 U.S. 556, 562; but cf. *Ford Motor Co.* v. *United States,* 335 U.S. 303, 322. A provision such as Paragraph 18 is incorporated in decrees to define when and how that obligation will be exercised.[11]

It embodies an extremely important element of antitrust relief, for it serves to prescribe the timing and manner in which the validity of the court's predictions, as reflected in the original decree, will be tested against observed economic developments. Such a provision reduces the necessity for appeals by the government directed at the adequacy of relief. *Associated Press* v. *United States, supra.* It further per-

[11] Here the lower court not only retained jurisdiction generally (see Par. 23 of the decree, App. B, p. 49), but specifically included another paragraph in its decree—Paragraph 18—explicitly providing for a re-examination thereof after a fixed period of time. As developed earlier (*supra*, pp. 15–17), we regard the *Swift* standard as inapplicable where the government seeks modification of a litigated antitrust decree. This is particularly so, in our view, in the situation like the instant one, where the decree includes a provision such as Paragraph 18, in addition to a general retention of jurisdiction to modify in the future.

mits an extremely desirable degree of flexibility on the part of antitrust enforcement officials, as to the nature and scope of relief sought initially, particularly in those cases where relief questions pose considerable difficulty. The decision below, however, seriously undermines these purposes and departs from established criteria for effective relief in antitrust cases. As a result of this error, a company whose monopoly power was supposed to have been eliminated by a decree entered more than a decade ago continues its domination of the affected industry.

2. *The decree has not broken up or rendered impotent United's monopoly.* It is clear on this record that, viewing the shoe machinery industry as a whole, United continues to enjoy a monopoly or near-monopoly position and that "workable competition" has not been established.[12] The district court found that United presently controls between three-fifths and two-thirds of the market and receives 62.2 percent of the total industry revenues. None of its competitors compares with it in range of machine types offered, assets, production or research facilities, or sales.

While United's principal source of revenues is from leased machines ($22.3 million, or 54 percent

[12] "'The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new or potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements * * *'." *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 176, quoting from Report of the Attorney General's National Committee to Study the Antitrust Laws, 320 (1955).

of total industry revenues), only a few of its competitors can afford to lease on a substantial scale. Only two of its manufacturing competitors (and one second-hand dealer) had more than $1 million in shoe machinery revenues in 1963; the remaining companies were relatively small and most were miniscule in size. None is capable of offering the broad line of machine types leased and sold by United, and most offer only a handful compared to United's 115 basic machines. No broad-line company with substantial resources has entered the field, and there is no evidence of any substantial potential entrant who might influence competitive behavior in the market (cf. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. at 176; *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651). United's present dominance of the industry, combined with the market advantages which its past dominance gave it, constitute a significant barrier to new entry. Cf. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 586 (concurring opinion of Justice Harlan). Indeed, the court below acknowledged that in several sectors of the shoe machinery market United is without significant competition.[13]

[13] The court made a number of findings which appear inconsistent with this analysis. We believe these are clearly erroneous.

It found that large machine manufacturers were hesitant to enter the shoe machinery industry because the rate of return was unattractive as compared with other machinery markets (App. A, p. 37). But there was no evidence before the court regarding rates of return in other industries. It was excluded by the court's pretrial order.

In finding that United's shoe machinery revenues had declined from $32 million in 1955 to $24 million in 1963, the court excluded from its computation United's income from conver-

Thus, after ten years which were marked by dynamic growth in the economy as a whole, a static monopolistic structure persists in the shoe machinery industry. This clearly indicates that the moderate measures of the original decree have not worked. Nor does the record indicate that a further "erosion" of United's monopoly position can be expected by reason of competitive forces presently existing in the market. If the market is not competitive now, it is unlikely to become so in the absence of substantial increments of new demand or remarkable new innovations. Moreover, since many key provisions of the

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sion sales which ballooned in 1955, the first year of the decree's operation (App. A, p. 31). If it had compared revenues in 1954 (the year before the decree) and 1963, and had included revenues from parts and service, United's aggregate shoe machinery earnings would have been $35.6 million in 1954 and $35.4 million in 1963 (Pl. Exh. 68, *supra*).

The court's finding that United's "12 most important domestic competitors" doubled their gross revenues between 1955 and 1963 (App. A, p. 31) is based upon a chart at page 15 of United's closing brief, which did not show the 12 largest shoe machinery manufacturers in 1955, and which showed on its face that in 1955 several of the 12 companies either were not in the shoe machinery business or had revenues which were unknown.

The court's finding regarding conversion sales (App. A, pp. 32–33), *i.e.*, sales of used machinery to the lessee, glosses over evidence that the number of such sales has been continuously declining since the decree, thus threatening to dry up the second-hand market which the court cites as an important competitive factor. (Pl. Exhs. 68, 74, *supra*).

The court found that United's continued dominance was not due to restraints of trade and that United had fully complied with the decree (App. A, pp. 29, 36). But there is no evidence supporting this in the record, since it was excluded by the pretrial order.

present decree are declining in significance,[14] there is no basis for the court's renewed prediction that United's monopoly position will continue to decline.[15]

3. *The case should be remanded for further relief.* The failure of the moderate provisions of the original decree to restore effective competition in the shoe machinery industry after a full decade indicates that more effective measures are necessary. The public is entitled to the restoration of competition as rapidly as possible. Since mere changes in United's restrictive practices, under the original decree, have not done the job, the district court should have considered direct measures which will deprive United of the benefits of its past illegal conduct and break up its monopoly position. In view of the history of this case and the present state of the industry, we believe, at least *prima facie,* a case has been made for divestiture of a portion of United's shoe machinery assets. Market power is often closely related to dominance in productive capacity and one of the most effective means of striking at that power is to convert part of the capacity into a new source of competition.

In its original decision the district court rejected a proposal that United be dissolved into three manufacturing concerns because it considered such a pro-

[14] *E.g.*, most of the patents United was required to license have expired, while its new patents, as to which there is no compulsory licensing, cover important new devices, such as injection-molding machines (see note 19, *infra*).

[15] Despite United's continued dominance of the market, it should be noted that the district court did not provide for another re-examination of its decree in the light of additional experience. In this respect, the court's prediction is quite open-ended.

posal to be impractical (110 F. Supp. at 348–349). But practicality is relative to what lesser measures can accomplish and have in fact accomplished, and must be accommodated to the need for effective relief. Now that provisions short of divestiture have proved unsuccessful, it is appropriate—indeed, in our view, essential—to reconsider the question.

In the instant proceeding, the government petitioned the district court to require United to submit a plan "pursuant to which the defendants shall establish an independent, full line shoe machinery manufacturing company capable of competing with the defendant in the shoe machinery market." Such a company might be created from one of United's present divisions,[16] with the requirement that United transfer to the new company sufficient productive assets, patents, technological know-how and personnel to enable it to begin successful operations.[17] If there

[16] United has a division (B. B. Chemical) and shoe cement and eyelet operations from which a going concern could be created which would have assets and sales greater than any of United's current competitors and which is already staffed with United personnel. Such a company would serve the apparel, textile, construction and packaging industries, as well as the footwear industry, and would thus have the advantage of serving a non-shoe machinery market which could support its efforts to expand its shoe machinery line. United could be required to give the new company assistance, in the form of equipment, funds, patents and technology, including the loan of personnel. Professor Carl Kaysen, who served as Judge Wyzanski's "law clerk" during the proceedings which led to the 1953 opinion and decree, makes this suggestion. Kaysen, United States v. United Shoe Mach. Co., 289–294 (1956).

[17] This would avoid such problems as lack of know-how, lack of access to shoe factories, and creation of unnecessary productive capacity.

are substantial economic reasons why such a plan is not feasible, given the present state of the industry, the burden should be on United—not the government—to establish this at a hearing.[18] Other possibilities for forms of partial divestiture exist, and, for instance, might include the acquisition of some of United's shoe machinery assets by an existing company.

If partial divestiture of United's domestic assets should prove impractical, other methods of achieving the same result should be considered. For example, United's British Commonwealth group is centered around British United Shoe Machinery Corporation. It is probably the largest shoe machinery company in the world after domestic United, although it presently exports little if any machinery into the United States. Since there are no customs duties on the importation of shoe machinery, the British company could be an important actual or potential competitor if separated from United, and its entry could be expected to motivate companies in the market to more efficient performance, particularly in respect to the development of new machines.[19]

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[18] As noted earlier (*supra*, p. 10), because of the district court's determination to bifurcate the proceedings below, no evidence was introduced on the question of what sort of further relief would be appropriate. The government does not view its suggestion that United be required to establish a competing company as the only suitable form of further relief. Rather, that suggestion was one made at the initiation of the instant proceeding and simply represents one form which the basic additional relief which the government thinks necessary and proper—partial divestiture—might take.

[19] The district court might also consider additional patent relief, such as making available to the industry on a reasonable

Other possibilities may be developed once the district court undertakes to explore the question of further relief. But until a hearing is held on that question, the prospects for additional and more effective remedies cannot be adequately evaluated. Exploration and development of a record on relief issues were wholly foreclosed by the district court's pre-trial order and by its erroneous determination that modification of the decree was unwarranted. That decision—that no further relief is warranted—should be reversed, and the case should be remanded to the district court for a further hearing on the question of additional relief, and, ultimately, for appropriate modification of the original decree.

CONCLUSION

This appeal presents substantial issues affecting the adequacy of antitrust relief under Section 2 of the Sherman Act. Probable jurisdiction should be noted.

Respectfully submitted.

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royalty basis patents acquired by United since the date of the original decree (see note 14, *supra*). This might be accompanied by a requirement that technical know-how, blueprints, and the like be made available with the patent licenses.

APPENDIX A

United States District Court

District of Massachusetts

Civil Action No. 7198

UNITED STATES OF AMERICA

v.

UNITED SHOE MACHINERY CORPORATION

OPINION

April 11, 1967

WYZANSKI, *Chief Judge:* The Government and United Shoe Machinery Corporation have each filed a petition for modification of this Court's decree of February 18, 1953, affirmed by the Supreme Court of the United States May 17, 1954, and subsequently modified July 12 and September 17, 1954. See *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass.), aff'd. *United Shoe Machinery Corp.* v. *United States*, 347 U.S. 521.

The Government's petition seeks to have United dissolved into two companies. United seeks to have the restrictions now imposed limited to requirements of sale of any machine types offered for lease, maintenance of a reasonable commercial relationship between sale terms and lease terms, separate charges for service, and avoidance of restrictive clauses such

as the full capacity clause. Both petitions rely upon the following language in paragraph 18 of the decree:

> "On C Day [December 23, 1964] both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market."

Threshold questions are what is the scope of this Court's power in these proceedings, what standards are to be applied in the exercise of this power, and what issues are before this Court. With respect to the first two questions an authoritative answer is given by *United States* v. *Swift & Co.*, 286 U.S. 106. A court can modify a continuing injunction not on the basis of conditions that existed at its making, but only on the basis of new and unforeseen conditions. Moreover, the court should require a clear showing of grievous wrong. In *Swift,* where the Supreme Court denied a defendant's application to have a decree modified, it enunciated the criteria in the following words (286 U.S. at p. 119) applicable *mutatis mutandis* to a plaintiff's application:

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery

> business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

Swift has been followed consistently. *Morse-Starrett Products Co.* v. *Steccone,* 205 F. 2d 244 (9th Cir.); *Bigelow* v. *Twentieth Century-Fox Film Corp.,* 183 F. 2d 60 (7th Cir.); *United States* v. *Lucky Lager Brewing Co. of San Francisco,* 209 F. Supp. 665 (D. Utah).

Nothing in paragraph 18 of the decree departs from *Swift's* teaching or purports to confer upon this Court a broader power to alter its decree, or authority to apply different standards. The requirements remain (1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions. Indeed if paragraph 18 gave this Court the power to alter a decree on any lesser showing the decree would not have been final and appealable to the Supreme Court.

What paragraph 18 does is to direct the parties to an issue: the decree's "effect in establishing workable competition." The phrase was unfortunate because it has no precise legal meaning. But if paragraph 18 be read against the accompanying opinion, *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, it is apparent that what the Court was inviting was information as to how successful the decree had been in gradually eroding United's 1953 power to monopolize the market. The opinion makes it plain that the ob-

ject of the decree was during a ten year period not to restore so-called workable competition but to move toward establishing it.

The issue now raised requires that this Court first state what it knew at the time of the decree and what it then chose.

The following were among the facts of which this Court was aware in 1953. United had by far the largest financial and patent resources in the shoe machinery industry. It was the only company that offered a wide line of machine types. If United were allowed to continue leasing, even on a basis that gave shoe factories an alternative to purchase the leased machine at an equivalent price, almost all shoe factories would prefer to lease their new and more complicated machines. That preference would enable United to continue its visits to most shoe factories. It would permit United to place machines on lease on an experimental basis. It would make it difficult for any competitor to succeed in connection with the marketing of complicated expensive types of machinery for which there was a thin market unless the competitor had resources adequate to offer a long line of machine types, to accept compensation in the deferred form of rental payments, to make its lease terms the commercial equivalent of its sale terms, and to withstand the at least temporary inconvenience of having leased machines returned after a short rental period. In short, this Court was quite cognizant of the fact that permitting United to continue as a single enterprise engaged predominantly in leasing rather than selling made it almost certain that at the end of a decade, absent a strong outside challenger, United's market power would be merely diminished not destroyed.

Yet this Court chose not to dissolve United, and

not to prohibit leasing, but merely to purge the leases of certain specific restrictive clauses, to require United to offer lessees the alternative of purchasing, and to require United to take certain miscellaneous steps which need not now be recited. Among the reasons that this Court made this choice were that the Supreme Court had approved the constitution of United as a single enterprise, that it had permitted United to proceed with leasing as an exclusive method of distributing machines, that United had engaged in no predatory or immoral practices, and that United owed much of its position to superior products and services, to its own inventions, and to other results of United's skill, ability, and efficiency.

Both parties have submitted requests for findings. They have been helpful in directing this Court's attention to what the decree has accomplished, to what are the dynamics of the 1963–1964 [hereafter sometimes called "the present"] shoe machinery market, to the freedom of choice now enjoyed by the shoe factory users of shoe machinery, and to the freedom of competitors in the present market structure. But those topics need not be covered by this Court in detail and hence, so far as not granted herein, all requests for findings are denied.

Paragraph 18 of the decree by referring to affidavits indicated that this would be a summary proceeding. It is important not to plague anti-trust law by establishing a precedent which might lead to full scale second trials of anti-trust cases on every claim that, as shown by its effects, an outstanding decree was too lenient or too severe. The only findings which this Court deems appropriate and necessary follow in numbered paragraphs.

1. United complied fully with this Court's decree.
2. Before the 1953 decree United's share of the

shoe machinery market by any measure was about 85 per cent. While in 1953 there was no specific finding with respect to United's then share of the revenue from shoe machinery sold and leased, it is a fair inference that, because of its strong position in the distribution of major machines yielding the largest revenue, United's share of the total revenue exceeded 85 per cent. In 1963 it had declined to about 62 per cent of the current shoe machinery market.

3. That market now includes machines for the manufacture of vulcanized rubber because such machines are competitive with injection moulding machines and other shoe machinery, are used in conventional shoe factories, and are used for both leather-upper and fabric-upper footwear.

4. The aforesaid revenue percentage of the shoe machinery market is a far more satisfactory index of share of the market than any other suggested. That index is far more illuminating than one based on a mere count of machines in position in shoe factories without distinguishing the machines by type, or value, or yield. It is also more satisfactory than one based on the value of annual shipments, an index which disregards the payment of rentals upon or conversion prices for machines shipped in previous years. It is a better index than one computed by the use of tables with 30 classifications according to the major and minor shoe machinery processes of the pre-1953 decree period, and referred to in the 1953 opinion, 110 F. Supp. at pages 304–305, 306. Those classifications do not reflect the extent to which technological changes require that there be grouped in two over-all classifications the machines used in competitive processes for (a) lasting and (b) sole attaching. Moreover, insofar as a tabular presentation is applied to machines in position in shoe factories in 1963 it fails

to recognize that, unlike the situation in 1953, machines of United origin, not necessarily being on lease, are not necessarily sources of current payments by shoe factories and are not part of the current market.

5. There are many indicia confirming the correctness of the conclusion derived from the revenue index that United has about three-fifths to two-thirds of the shoe machinery market now, that is, a shrinkage of more than a quarter of the share of the market it had in 1953. (a) Although during the last decade the number of shoes produced annually rose, and therefore it may be inferred that the value of shoe machinery in the shoe factories rose, and although the value of the dollar declined, nonetheless United's total annual revenues from shoe machines sold and leased, from the sale of parts, and from repair services in 1955 was certainly less than before the decree. Indeed the combined lease and sale figures for United shrank from $32 million in 1955 to $24 million in 1963. During the same 1955–1963 period United's 12 most important domestic competitors doubled their gross revenues. (b) United's decline in annual earnings before taxes of the Shoe Industry Group, after elimination of proceeds from conversion sales, had dropped from over $11 million at the time the decree became effective to less than $6 million at February 29, 1964. (c) United's employment declined approximately 30 per cent in its Beverly plant and 40% in its service branch. (d) Of the machines shipped in 1963 in the 30 classifications shown in the tables used in 1953, United supplied 51.7 per cent, which is a figure combining 65 per cent of so-called major machines and 42.3 per cent of minor machines. (e) Of the machines now in shoe factories about 54 per cent were of United origin, but

only 47 per cent were being leased from or had been bought from United.

6. Since the decree the number of United shoe machines on lease in domestic shoe factories fell from 91 to 26 thousand. Of the machines in domestic shoe factories only 17 per cent in 1963 were on lease from United. While approximately 90 per cent of the machines shipped by United in the post-decree decade have been on lease, a substantial number of them are ultimately bought by shoe factories. The reasons that most shoe factories initially lease rather than buy machines of the expensive types are not because the lease terms are not commercially related to sale terms, but because shoe-makers prefer to have the right easily to dispose of expensive machines and because they lack either the financial ability or the inclination to invest substantial capital in shoe machinery. The continuation of the pattern of leasing expensive machines is a response to the demand from the shoe-making market which has 785 enterprises, many of them of modest resources. Without leases many of them could not continue in business.

7. The decree has tended to open the market by promoting the return of United machines by customers. For example, the total returns to United by customers of so-called major machines exceeded the total shipments by more than one-third during 1955–1964. This trend promotes competition by making the shoe factory a more frequent customer for shoe machinery.

8. In the decade 1953–1963 shoe factories purchased over 53,000 machines which they had previously leased from United. Most of the conversions occurred soon after the decree. But in the tenth year over 1300 machines were converted, and in 1964 the number was 678, which was more than one quarter of the

machines United leased that year. Each purchase reduces United's power by making it likely that the machine will ultimately enter the second-hand market.

9. United has faced important competition from an active second-hand market, largely of its own machines. In 1963 that market sold about $3 million in machines, which stands comparison with United's revenues of $22 million from leases and $1.6 million from sales. The second-hand market is sufficiently vigorous so that it is not unusual now for shoe factories to start in business utilizing many machines originally of United manufacture, without obtaining a single machine from United.

10. At the end of 1955–1964 period there were about 126 suppliers of new shoe machines. The pace of entry into the market in each three-year period after the decree increased: from 11 to 19 to 26, or a total of 56 companies. None of these, however, is a company offering a wide line. Indeed while United offered 115 types of machines on current terms and 24 types on application, Compo Shoe Machinery Corporation offered only 22, International Shoe Machine Corporation only 5, and most companies only 1. The small companies have shown that in many sectors of the industry a machine manufacturer can be effective in one or several parts of the industry without the need of participating in other parts.

11. The unanimous and representative testimony of shoe makers is that there now exists in the shoe machinery market sufficient competition to allow the shoe manufacturers to select machinery as they wish on the merits of the machines available and in accordance with the processes they select to meet the various style changes in the consumers' market. In particular, United is subject to constant full and free competition from competitors' machines in toe last-

ing, side lasting, sole attaching, pulling over, and bottoming. That kind of competition reveals that several of the 18 sub-classifications of "major machines" are in competition with one another and that percentage calculations based upon each separate classification are misleading unless machines which are in competition with one another are grouped together, thus reflecting the true character of the shoe machinery market.

12. In 1953 United had and exercised power to exclude competitors from every significant classification of shoe machinery except cement sole attaching machines.

13. However, by 1963 United was not in fact exercising, and indeed was incapable of exercising, exclusionary power over the entire market. This is shown not merely by its reduced share of the market, by its altered leases, and by the growth of competition from domestic manufacturers, importers, and second-hand machinery but by the following miscellaneous indicia.

(a) With respect to the lasting and sole attaching sectors of the market cement processing, injection molding, and direct-mold vulcanizing had become competitive with the seven older techniques,—McKay, Nail, Turn, Goodyear Welt, Stitchdown, Prewelt, and Lockstitch. Those older techniques, where United offered over 90 per cent of the machine types, declined from 55 per cent of the relevant sub-market in 1950, to 42 per cent in 1955, to 33⅓ per cent in 1963. In the newer techniques, United does not hold a commanding position. The result has been that United cannot control competition in the lasting sector as a whole or in the sole attaching sector as a whole.

(b) Of the shoe machines in position in shoe factories only 51 per cent had been shipped by United

and only 17 per cent were covered by United leases. That finding, as already noted, does not show United's share of the entire market. But, inasmuch as from other evidence it appears that United's share of so-called major machines is far higher than its share of minor machines, it follows that in minor machines as a whole, and probably in most categories of minor machines, United has no exclusionary power.

(c) Of the shoe machines shipped in 1963, United's share by value may be as little as 48 per cent, and certainly is not much over 50 per cent. Here again, that finding, as already noted, does not show United's share of the entire market, because it eliminates current revenues from machines shipped in earlier years. But, in view of other evidence indicating that United's share of so-called major machines is far higher than its share of minor machines, it follows that in minor machines as a whole, and probably in most categories of minor machines, United has no exclusionary power.

14. In 1963 there were certain sectors of the shoe machinery market in which United was without significant competition, but it does not follow that United's position in those sectors was a result of United's exclusionary power or made competition unworkable. Indeed, it is more reasonable to conclude that the want of competition was due to the absence of a challenger of adequate, but not unusual, financial resources, skill, ability, and efficiency.

15. In almost every one of the 45 of the 187 operations in domestic shoe factories where United was the sole source of supply fewer than 6 machines a year are demanded and the operation, looked at alone, is not economically attractive. What is far more important, the operation is shown to be competitive with other operations for which other sources than

United supply machines. On this record, it is inferrable that, for the purpose of the anti-trust acts, the machines used in the 187 operations ought to be combined to constitute perhaps as few as 7 markets, one for each stage of shoemaking. It is not clear whether after that was done United would have a dominant position in some of the sub-markets thus constituted.

16. If United does have a dominance in some of those sub-markets such dominance is not due to "restraints of trade" in the technical sense. There is a variety of causative factors such as United's financial capacity to offer lease terms commercially equivalent to sales terms on the same machine types, United's broad line of machine products manufactured in one plant (which permits United with economic advantage to supply machine types for which there is a small annual market and which also permits United to set for different types of machines terms which reflect different rates of profitability), United's constant contacts with most shoe manufacturers as a result of the large volume of machines United ships annually and the large number of leases it has outstanding, and United's excellent products, superior skill in merchandising, efficiency in administration, inventions and know-how. Every one of those factors was known to this Court when it entered its decree in 1953. New information with respect to the operation of those factors since 1953 shows that they have not individually or collectively had an unforeseen effect or worked a grievous wrong.

From the foregoing findings of fact this Court concludes that the 1953 decree has operated in the manner and with the effect intended. It has put in motion forces which, aided by new technology, have eroded

United's power and already dissipated much of the effect of United's monopolization.

In some sectors of the market, competition is already flourishing. In the sectors where it is not flourishing, all artificial barriers have disappeared and the position enjoyed by United is chiefly traceable to the fact that it has not yet been challenged by a competitor of financial resources of any magnitude. United follows no practice and enjoys no significant advantage which could preclude or restrain competition by an enterprise of a size comparable with leading machinery companies in other industries, that is, with resources adequate to offer lease terms commercially equivalent to sale terms and to offer simultaneously machine types in several categories where the annual demand is too thin to be economically supplied separately. The apparent reason why no such competitor has appeared is that compared with rates of return in other machinery markets, the rate of return in the shoe machinery market is unattractive.

It cannot rightly be said that a market or a sector thereof is, in the legal sense, not open to competition where an effective challenge may be made by an enterprise of resources common in comparable fields.

While this Court now has before it the facts of the decade 1954–1963 which were not known in 1953, nothing new, aside from the updating of the data, is involved. United has not created new barriers. In 1953 the resources of United in absolute terms were substantially the same as, and in comparative terms substantially less than, they are now.

It may have been an error in 1953 not to have dissolved United rather than to allow sectors of its power to be dissipated by small competitors, and to leave other sectors of power to be effectively attacked only when a small competitor became large or a large

competitor appeared. But the choice was made in 1953 for reasons already adequately explained.

What the Government is complaining of is not that the decree did not work as expected, but that working in the foreseeable and intended way the decree did not accomplish what the Government had originally prayed for and what this Court had rejected. In short, the Government petitions that the decree be reversed because this Court erred in 1953. On the authority of the *United States* v. *Swift & Co.*, 286 U.S. 106, 119, the Government's petition is denied.

United's petition stands no better. United wants to adjust the decree on the ground that the purposes of the decree have been accomplished and milder restraints are now in order. But the premise is unsound. The decree is still working at its long-range task of freeing the market from all consequences of United's monopolization and keeping the door wide open for the arrival of an adequately provided challenger. Until there are competitors throughout the market, the decree should stand unmodified. United's petition is also denied.

Before concluding, this Court expresses its appreciation of the brief filed by *amici curiae*, the National Footwear Manufacturers Association and the New England Footwear Association. Their analysis of this case has greatly influenced this opinion. Their assurance that their clients, who represent substantially all the shoe manufacturers, who are among the chief intended beneficiaries of this Court's decree and who have had an unequalled opportunity daily to observe its effects in the last decade, are content with its operation and do not want it modified, gives added ground for leaving the decree undisturbed.

Petitions denied.

CHARLES E. WYZANSKI, JR.,
Chief Judge.

United States District Court

District of Massachusetts

Civil Action No. 7198

UNITED STATES OF AMERICA

v.

UNITED SHOE MACHINERY CORPORATION

ORDER

April 11, 1967

WYZANSKI, *Chief Judge:* In accordance with the opinion filed this day, the petition of United Shoe Machinery Corporation and the petition of the United States, each seeking modification of the decree herein, are severally denied.

CHARLES E. WYZANSKI, Jr.,
Chief Judge.

APPENDIX B

UNITED STATES *v.* UNITED SHOE MACHINERY CORPORATION

DECREE OF THE COURT

As Modified—July 12, 1954.

Amendments have been made only in Paragraphs 1, 6, 6(h), 6(i), 6(j), 7, 12, 13, 14, and 20.

This cause having come on to be heard, and the Court having fully considered the evidence and arguments, and having filed its Findings of Fact, and Opinions on Violation and Remedy, it is hereby

Ordered, Adjudged, and Decreed that:

1. As used in this Decree:

"A Day" means January 1, 1955.

"B Day" means April 1, 1955.

"C Day" means January 1, 1965.

"Shoe Machinery" means all types of shoe machinery distributed to shoe factories for use in the manufacture or repair of footwear, except dry thread sewing machines.

The words "machine type," "machines" and "machine" as used in this Decree mean "shoe machinery" as defined herein.

The word "supplies" as used in this Decree means all products, when distributed by defendant for use or consumption by shoe factories, of the types heretofore classified by the defendant as sales merchandise.

The word "patent" as used in this Decree means a United States patent for an invention

relating to the manufacture, use or sale of footwear, shoe machinery or supplies.

2. Defendant violated Sec. 2 of the Sherman Act, 15 U.S.C. Sec. 2, by monopolizing the shoe machinery trade and commerce among the several States. Defendant violated the same section of the law by monopolizing that part of the interstate trade and commerce in tacks, nails, and eyelets, which is concerned with supplying the demand for those products by shoe factories within the United States. The other charges of violation of the Sherman Act set forth in the complaint are dismissed with prejudice. No obligation of the defendant under this decree shall apply to its manufacturing, distribution, service, patent or other activities in any industry other than shoe machinery and supplies or in relation to any industry other than the shoe manufacturing industry.

3. Defendant, its subsidiaries, and each of their directors, officers, agents, and employees, and, all persons acting for them are hereby enjoined and restrained from further monopolizing those parts of the trade or commerce among the several States which have been referred to in the previous paragraphs.

4. All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market.

5. After A Day, defendant shall not offer for lease any machine type, unless it also offers such type for sale. Defendant, if it offers any machine type for lease, shall set such terms for leasing that machine as do not make it substantially more advantageous for a

shoe factory to lease rather than to buy a machine. Defendant shall not be required to secure advance judicial approval of the financial terms in sales or lease contracts. But if any lease or contract substantially discriminates in favor of leasing, plaintiff may apply to this Court for further specific relief.

6. Before A Day, defendant, if it desires to continue to lease any shoe machinery, shall file in this Court a standard form of lease that meets the following directions. Other standard forms of lease shall be filed in this Court by defendant promptly as they are printed and before defendant places them in use.

a. The maximum term for either an original or renewal lease shall be five years.

b. Provision shall be made that a lessee shall have the right to return the leased machine at any time after one year, on paying all rentals already accrued, the shipping charges, the cost of broken and missing parts, and in addition, no more than the equivalent of the monthly (not the unit) payments which would have been due had the lessee kept the machine for an additional three months. The lease may provide for return on terms more favorable to the lessee if the return is due exclusively to defects in the machine, or customer dissatisfaction after a trial period, or customer abandonment of operations. But no return charge shall discriminate on account of the substitution of a competitive machine.

c. The new forms of lease shall not include any return or deferred payment charges other than those specified in the previous paragraph. But they may include provisions for initial charges and deposits.

d. Defendant may, if it sees fit, use a unit charge in addition to, or as an alternative to, monthly rental charges. But such unit charges shall have no minimum.

e. After A Day, defendant shall not include within

any lease, whether unit charges are used or not, a full capacity clause, or any equivalent.

f. After A Day, defendant shall not include either in the terms of, or the application of, any lease any plan similar to the right of deduction fund which it has heretofore established, or the 1935 Plan which it adopted for lessees desiring to return machinery.

g. Defendant shall not be obliged to present to the Court a statement of what will be the amount of, or method of calculating, its rentals, its charges, deposits, or like financial terms. But, after A Day, in preparing, executing, or applying its leases, defendants shall not discriminate between customers of the same general class, except that defendant may make different deposit provisions for different persons, upon an individual basis.

h. Defendant may propose various uniform lease riders to provide for peak-load or trial installations. Defendant may also use various loan forms to cover installation of experimental or other machines for which commercial terms have not been adopted. All such riders and forms shall comply with the preceding paragraphs.

i. Each lease shall expressly state what services and privileges it covers. After A Day, defendant may render, without separate charges, instruction services, installation services, repair services, or other services, during a period of 30 days, exclusive of Saturdays, Sundays and holidays, after the machine has been first installed and set up in line for use in shoe manufacture. After such 30-day period defendant shall not provide any such services for a machine covered by a lease, except during the first 60 days, exclusive of Saturdays, Sundays and holidays, of a trial installation period covered by a lease trial rider as above provided, other than upon the basis of separate and

reasonable charges for the services rendered, and the permission to render service for machines covered by lease trial riders herein contained shall be subject to the condition that similar service is made available for trial installations of machines whether to be leased or to be sold.

j. Defendant shall not vary the substance of the forms of lease submitted to the Court, without the Court's approval, but defendant may, without submitting them to the Court, use such special forms of lease or loan agreements as may be appropriate to the requirements of Federal, State or local governmental agencies and of educational institutions not engaged in the manufacture of footwear for profit. This provision shall not be interpreted as requiring defendant to secure advance judicial approval of the dollars and cents figures used in setting monthly rental charges, unit charges, deposits, or other specifically fiscal aspects of the lease.

7. Except for good cause, defendant shall not after A Day refuse a prospective customer's request to lease or buy a machine, of a type which defendant is at the time of such request offering for commercial lease or sale. In the event that a prospective customer is refused the privilege of buying or leasing a machine, he shall have the right to intervene in this case in this Court to have his controversy adjudicated, and in such proceedings, defendant shall have the burden of proving that there is good cause for refusing to make the sale or lease.

8. Before A Day, defendant shall present to the Court, if it desires to continue to render repair and other services, a tariff of the charges which it proposes to apply for rendering service. This service tariff shall have uniform charges for leased and sold machines. It may take into account travel time as

well as time used in making repairs or rendering other services. It may recognize any economy defendant actually realizes in its business on a quantity basis, or any other economies in servicing customers of a particular type, or customers who commit themselves for particular periods of time, in any event, however, not exceeding twelve months at a time. Neither the tariff nor this Decree shall be interpreted as requiring defendant to render services in connection with machines, or parts, not of its manufacture. The tariff shall provide that parts shall be made available on the same terms to customers receiving services, customers not receiving services, and any other person; provided, however, that defendant shall not be obliged to furnish parts to a customer to help him construct an entire new machine out of assembled parts.

9. Before B Day, defendant, after conferring with plaintiff, with representatives of The National Shoe Manufacturers Association, and with any lessees who previous to B Day have intervened in these proceedings, shall present to the Court a detailed plan for terminating all outstanding leases. This plan shall make appropriate non-discriminatory financial provisions for defendant's rights and each lessee's rights in connection with the termination of existing leases. It shall also make make non-discriminatory provisions under which, within a reasonable period of time, lessees under leases existing before B Day may buy or lease those machines which have been installed. Such provisions shall be at least as favorable to shoe factories as the provisions in the new lease and sale forms.

10. Before B Day, defendant shall submit a plan for disposing of such parts of its business and the business of its subsidiaries as are concerned with the

manufacture or distribution of tacks, nails, and eyelets.

11. Beginning three years after A Day, defendant shall not distribute any supplies not manufactured by itself or a corporation in which it owns at least 20% of the Common Stock, provided that this shall not apply to supplies acquired by United before then.

12. Defendant shall grant to any applicant, except a deliberate infringer, a non-exclusive license under any or all patents now held by defendant on reasonable non-discriminatory royalty terms. Such licenses may, however, be limited to the manufacture, use, and sale of shoe machinery, shoe supplies, and like products used in shoe factories. Such licenses may contain a provision for the inspection of the records of the licensee by an independent auditor who shall report to the licensor only the amount of royalty due and payable and no other information. Such licenses shall contain a provision for imparting in writing, at a reasonable charge by the licensor to the licensee, the methods and processes used by defendant as of the date of this Decree in its commercial practices under the patents licensed. This Court reserves jurisdiction to pass upon the reasonableness of any royalty or charge herein directed to be reasonable. Nothing in this paragraph applies to patents issued upon the basis of applications filed later than A Day, nor shall anything herein prohibit defendant from making a bona fide sale or assignment from time to time of any patent held by it.

13. After A Day, defendant shall not acquire any patent or patent application except patents or patent applications acquired by reason of bona fide employment of the inventor by it or by a subsidiary unless defendant files in this Court an agreement to license that patent or patent application as provided in the

previous paragraph with respect to patents it now owns.

14. After A Day, defendant shall not acquire any exclusive license under any patent or patent application unless such exclusive license grants defendant the right to license others and defendant promptly files in this Court an agreement to license as provided in Paragraph 12 of this Decree.

15. After A Day, defendant shall not acquire any shoe machinery business, any business manufacturing or distributing supplies for shoe factories, or any part thereof, or any stock therein, if the transaction involves more than $10,000 or its equivalent.

16. After A Day, defendant shall not buy or acquire any second hand shoe machinery manufactured by it or any other person except for experimental or like purposes. The total acquisitions under this paragraph in any one year shall not represent an expenditure of more than $25,000, or its equivalent. Nothing in this paragraph shall be construed to apply to such rights as defendant may have to repossess, or to acquire at public auction, machines which it has conditionally sold and which the purchaser has lost the right to retain.

17. After A Day, defendant shall not continue any plan for quantity discounts in connection with any of its supplies, unless such discount system complies with all applicable laws.

18. On C Day, both parties shall report to this Court the effect of this Decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market.

19. Defendant shall pay the costs of this case.

20. On or before October 1, 1954, defendant shall send to each of its then lessees a written copy of this Decree as modified prior to the date of mailing.

21. Nothing in this Decree shall impose any obligation on defendant until three months before A Day.

22. Nothing in this Decree shall impose any obligation on defendant or its subsidiaries to do or omit any action outside the United States.

23. Jurisdiction of this cause is retained for the purpose of enabling either of the parties to apply to this Court at any time for such further orders and directions as may be appropriate for the correction, construction, or carrying out of this Decree, and to set aside the Decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act.

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IN THE

Supreme Court of the United States

October Term 1967

No. 597

UNITED STATES OF AMERICA,
Appellant

v.

UNITED SHOE MACHINERY CORPORATION

DEFENDANT'S MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term 1967

UNITED STATES OF AMERICA, *Appellant*		
v.		No. 597
UNITED SHOE MACHINERY CORPORATION		

DEFENDANT'S MOTION TO DISMISS OR AFFIRM

United Shoe Machinery Corporation, defendant below, hereby moves pursuant to Rule 16—

(1) to dismiss the appeal on the ground that it is not within the jurisdiction of this Court because not taken in conformity to statute;

(2) in the alternative if jurisdiction exists, to affirm the judgment of the District Court on the ground that the questions presented by the appeal are so unsubstantial as not to need further argument.

Opinions Below

The opinions below are reported in 266 F. Supp. 328 (1967) and in 110 F. Supp. 295 (1953), aff'd 347 US 521.

Jurisdiction

Jurisdiction of this Court is invoked under the Expediting Act of February 11 1903 § 2, 32 Stat. 823 as amended 15 USC § 29. Notice of appeal was filed June 9 1967,

but the essential underlying question was determined by the District Court February 18 1953 (110 F. Supp. 295) and the order of April 11 1967, in so far as appealed from, was merely a reconsideration of the 1953 decision.

Statutes Involved

(a) As to jurisdiction, 15 USC § 29 provides:

> "In every civil action brought in any district court of the United States under any of said Acts [the antitrust acts], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

28 USC § 2101 subsection (b) provides:

> "(b) Any other [*i.e.*, other than one involving constitutionality of an Act of Congress] direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

(b) The provisions of the Sherman Act, 26 Stat. 209 as amended, 15 USC § § 2 and 4, which are invoked by appellant, are set forth in the Jurisdictional Statement at p. 3.

Issues Presented by These Motions

Stated in their simplest form, the issues are whether a decree entered by a district court in 1953 which found monopolization but denied the Government's prayer for divestiture or dissolution, is subject to appeal in 1967 upon

the court's reiterated denial of divestiture after a further review held to show the effective working of the decree in the manner originally contemplated; and whether such an appeal, even if proper and timely, presents questions substantial enough to need further argument and consideration by this Court.

Facts Material To Motions

The Government in 1947 brought a civil action against United Shoe Machinery Corporation pursuant to Sherman Act § 4 to restrain alleged violations of Sections 1 and 2. The complaint charged in principal part monopolization of the domestic shoe machinery industry and of manufacture and distribution of certain shoe factory supplies. The trial was a very long one and the record voluminous.[1]

The decree, filed February 18 1953 (110 F. Supp. at 351-4, subsequently modified in respects not here material), found a violation of Sherman Act § 2 by monopolization of the shoe machinery trade and commerce among the several states, and also by monopolization of that part thereof in tacks, nails, eyelets, etc. which is concerned with supplying those products to domestic shoe factories. It dismissed with prejudice the other charges of Sherman Act violation. In addition to enjoining a continuation of the violations found, the decree set forth in numbered paragraphs 5-17 and 20-2 detailed provisions for the future conduct of defendant's business, with the object, as expressed by the trial court, "to extirpate practices that have caused or may hereafter

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[1]The trial court noted the 121 days of hearings, the 14,194 pages of transcript, the 5,512 exhibits totaling 26,474 pages, the 47 depositions covering 2,122 pages, the briefs on trial aggregating 1,893 pages on the two sides, and the requests of both sides aggregating 1,166 pages. 110 F. Supp. at 299; cf. Government Brief in No. 394 October Term 1953 pp. 4-5.

cause monopolization, and to restore workable competition in the market" (110 F. Supp. at 347). The court's opinion on remedy, in explaining the clauses of the decree, placed foremost in the discussion its rejection of the remedy of dissolution which Government counsel had proposed (110 F. Supp. at 348).

From the 1953 decree defendant appealed to this Court but the Government did not. Briefs of the parties here comprised 358 pages for defendant-appellant and 187 pages for the Government; of these appellant devoted 53 pages, and the Government 33 pages, to the remedial clauses of the decree. The Government brief contended that "The provisions for relief are appropriate and necessary" and emphasized "the careful consideration which underlies the provisions for relief" and "the logic, the clarity and the meticulousness of the opinion on remedy, and of the decree itself" (Govt. Br. in No. 394 October Term 1953 pp. 154, 156).

Neither brief in No. 394 discussed the trial court's denial of the Government prayer for dissolution, detailed findings on which occupy four paragraphs of the opinion in 110 F. Supp. at 348.[2] On the appeal, this Court affirmed on May 17 1954 with the following opinion *per curiam* (347 US 521):

> "The case having been fully argued and the Court being satisfied that the findings are justified by the evidence and support the decree, the judgment is affirmed."

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[2]By a surprising departure from the strong plea for dissolution made to the District Court in 1952 (p. 8 below), the Government now says that "There was no sound reason" for the Government to have challenged the adequacy of the 1953 decree on appeal and that the Government "might well itself have appealed on the adequacy of relief" if it had known in 1953 that par. 18 of the decree would be construed by the court as it now has been (Jurisd. St. pp. 13, 14).

Par. 18 of the decree directed a report to be made by both parties as to its effect, at the end of a ten-year period defined as C Day, viz. January 1 1965. This paragraph was carefully constructed to differentiate between a review of the working of the decree on the one hand, and on the other possible petitions for modification. It provided (110 F. Supp. at 344):

> "18. On C Day, both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market."

Both parties did as of January 1 1965 file written reports on the effect of the decree, and each petitioned for its modification. Defendant sought a relaxation of the decree and elimination of many restrictions imposed by it. The Government requested findings that workable competition had not been established by the decree and moved to reinstate in slightly different form the prayer for relief that had been denied in 1953.[3]

The trial court on April 11 1967 denied both petitions, 266 F. Supp. 328. This decision was rendered after proceedings on 14 trial days ending November 4 1966, which followed a pre-trial order made July 19 1965, a number of pre-trial hearings, and extensive conferences and stipulations between counsel relative to the basic facts. While the

[3]This petition, dated December 29 1964, sought a requirement that defendant "submit to the Court a plan, pursuant to which the defendant shall establish an independent, full-line shoe machinery manufacturing company capable of competing with the defendant in the shoe machinery market." This meant dissolution (as to the shoe machinery business) into two parts instead of the three proposed in 1953.

pre-trial order regulated the issues to be considered at the hearings, it made provision for additional matters to be considered "after a specific preliminary finding that such an excursion is necessary to achieve justice"; and the Government did avail itself of this exception and obtained an amendment of the pre-trial order in at least one instance (revenues as a measure of market share [Tr. 350-1]; see Jurisd. St. p. 10 fn. 9).

The hearings were conducted and the opinion and order now complained of were made by the same trial judge, Wyzanski C. J., whose original provisions in the decree had drawn the Government's approval for their logic, clarity and meticulousness (p. 4 above). Conceded by appellant to be a master of the subject-matter, Judge Wyzanski devoted the bulk of his opinion and findings to the Government's renewed demand for the dissolution denied in 1953 (266 F. Supp. at 330-4; Jurisd. St. App. A pp. 28-37). He reiterated on the facts as up-dated by the 1966 hearing the conclusion he reached in 1953 against dissolution or divestiture. Upon the basis of a comparison of what the court knew in 1953 with the more recent evidence summarized by him in 16 carefully formulated findings, the trial judge held that "nothing new, aside from the updating of the data, is involved"; that, while it may have been an error in 1953 not to have dissolved United, the choice of remedy (affirmed by this Court in 1954) was made in 1953 for reasons explained in his opinion and findings at the time; and that the Government's petition was, in short, that the decree be reversed because the trial court erred in 1953.

This appeal thus embraces essentially the same question —that is, refusal to direct divestiture upon a finding of monopolization—which was tendered in its stark and simple form by the 1953 decision, with the difference only that the refusal is now reiterated upon a record far more favorable to the defendant.

I

THIS COURT LACKS JURISDICTION OF THE APPEAL.

The motion to dismiss must be granted because the appeal is clearly out of time by the statutory standards. The question presented by the notice of appeal was decided against the Government in the 1953 decree from which it elected not to appeal.

The matter was at that time aggressively advanced by the Government and squarely determined against it, on findings more favorable to the Government than the findings of 1967. In its brief on relief dated January 29 1952, after trial, the Government began with a general discussion of the three basic objectives of relief (pp. 2-5) and devoted ten pages to the specific need for "Relief by way of corporate dissolution" (pp. 36-46). It cited at the outset the authorities in this Court for opening up the market to competitors, for prevention in future of acts found to constitute monopolization, and for depriving a violator of the fruits or benefits of monopolistic practices. This last principle, the Government told the trial court (p. 3),

> ". . . lends additional support to the Government's request for the dissolution of United, the divestiture of United's assets in the shoe supplies field, and the compulsory furnishing of United's technology to all applicants."

There then followed a detailed discussion of various injunctive clauses requested. This led into the argument for corporate dissolution with the statement at p. 36:

> "Discussion of the need for dissolving United has been deferred to this position in the brief not

> by reason of any doubt of the imperative need of such relief, but so that this Court can appraise the net impact of the injunctive relief that has already been proposed before it considers whether relief by way of dissolution is necessary."

After citing authority on divestiture as a remedy, this brief came to the basic question before the District Court (p. 37):

> "The basic question is: Assuming the maximum theoretical effectiveness from all the items of injunctive relief that have thus far been suggested, will that serve to dislodge United's illegal monopoly?"

To this the Government brief gave an unqualified negative, urging that divestiture was necessary on top of the injunctive relief granted (pp. 37-8):

> "Our answer is that, although these measures will reduce some of United's trade-restraining potentialities, the basic monopoly of United will stand untouched and unimpaired. United towers over its rivals like a giant oak spreading its roots system throughout the entire field of shoe machinery and inevitably drawing into itself all the nourishment of the marketing and technological resources in that field. Unless United is cut down to scale, no competitive seedling or sapling will be able to take effective root in the shoe machinery field. As stated by Justice Cardozo '* * * size carried with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.' *United States* v. *Swift & Co.*, 286 U. S. 106, 116. . . Even after the most refined and

well-articulated injunctive provisions have been included in this Court's judgment, customers for shoe machines will still turn to United rather than to any other source.

The futility of ordinary injunctive relief to break up the monopoly power possessed by United can be variously illustrated. . . ."

After ten pages of argument as to the necessity for and advisability of a dissolution of defendant, the Government brief of January 29 1952 summed up the point (p. 46):

"United's dissolution is a practical necessity for the emergence of competitive conditions in the shoe machinery industry. Dissolution can be accomplished, without undue hardship or dislocation. Even were hardship involved, however, such hardship would be a necessary and unavoidable consequence of terminating an illegal condition. See *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189; *United States* v. *Union Pacific Railroad Co.*, 226 U. S. 470, 477."

This considered and insistent demand for dissolution or divestiture was entertained and flatly rejected in 1953, by the decision which this Court affirmed in 347 US 521. On his summary of the evidence Judge Wyzanski found that the tests of monopolization laid down in *United States* v. *Griffith* 334 US 100 and *United States* v. *Aluminum Company of America* 148 F. 2d 416, approved in *American Tobacco Co.* v. *United States* 328 US 781 (110 F. Supp. at 343) had been satisfied. He held the corrective decree must be framed upon the basis of the presuppositions underlying *Aluminum* and *Griffith* (p. 347). In an elaborate con-

sideration of the philosophy of cure, the trial judge pointed to the history of the Standard Oil, American Tobacco and Alcoa cases and concluded that courts would not retain their authority in the antitrust field if they

> "... were in the habit of proceeding with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power.
>
> Such self-restraining considerations have peculiar force in this case. Until Alcoa lost its case in 1945, there was no significant reason to suppose that United's conduct violated § 2 of the Sherman Act. The Supreme Court had three times, in *United States* v. *Winslow*, 227 U. S. 202, *United States* v. *United Shoe Machinery Company of N. J.*, 247 U. S. 32, and *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, reviewed aspects of this company's, or its predecessor's activities. What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned,—indeed, one ought to go further and say they were in part endorsed. In the face of these decisions, it would be anomalous to charge the officers of United with any moral deficiency." (110 F. Supp. at 348)

On this foundation, the trial court in 1953 considered the four principal problems respecting a proposed decree, and began with the proposal for dissolution. To this remedy Judge Wyzanski devoted four paragraphs in his discussion and concluded (p. 348):

> "On the whole, therefore, the suggested remedy of dissolution is rejected."

The question of dissolution so decided in 1953, was decided with finality. The appeal taken by defendant at that time would have been impossible if that were not so because, as Judge Wyzanski points out, if par. 18 of that decree gave the court the power to alter it on a lesser showing than grievous wrong evoked by new conditions, the decree would not have been final and appealable to this Court (266 F. Supp. at 330; Jurisd. St. App. A p. 27). There is no reason the Government could not have appealed. In fact its view as to remedy, so positively expressed in the District Court, required it to appeal if it desired to maintain the claim of dissolution.

The court's statement in 266 F. Supp. at 330 of the facts it knew in 1953, compared with the new findings held to justify the denial of the Government's present petition (266 F. Supp. at 331-4; Jurisd. St. App. A pp. 29-36) establishes beyond any possibility of doubt that the question now tendered by the Government is the identical question decided against it in 1953, with respect to which it waived appeal. The Jurisdictional Statement does not and cannot controvert the finding of the trial court (266 F. Supp. at 330; Jurisd. St. App. A pp. 28-9):

> "In short, this Court was quite cognizant of the fact that permitting United to continue as a single enterprise engaged predominantly in leasing rather than selling made it almost certain that at the end of a decade, absent a strong outside challenger, United's market power would be merely diminished not destroyed.
>
> Yet this Court chose not to dissolve United, and not to prohibit leasing, but merely to purge the leases of certain specific restrictive clauses, to require United to offer lessees the alternative of purchasing, and to require United to take certain miscellaneous

steps which need not now be recited. Among the reasons that this Court made this choice were that the Supreme Court had approved the constitution of United as a single enterprise, that it had permitted United to proceed with leasing as an exclusive method of distributing machines, that United had engaged in no predatory or immoral practices, and that United owed much of its position to superior products and services, to its own inventions, and to other results of United's skill, ability, and efficiency."

Nor can appellant gainsay the concluding remarks of Judge Wyzanski (266 F. Supp. at 334; Jurisd. St. App. A pp. 37-8):

"While this Court now has before it the facts of the decade 1954-1963 which were not known in 1953, nothing new, aside from the updating of the data, is involved. . . .

It may have been an error in 1953 not to have dissolved United rather than to allow sectors of its power to be dissipated by small competitors, and to leave other sectors of power to be effectively attacked only when a small competitor became large or a large competitor appeared. But the choice was made in 1953 for reasons already adequately explained.

What the Government is complaining of is not that the decree did not work as expected, but that working in the foreseeable and intended way the decree did not accomplish what the Government had originally prayed for and what this Court had rejected. In short, the Government petitions that the decree be reversed because this Court erred in 1953."

Against an appeal so tardily taken from a decision so long accepted, the jurisdictional bar set up by Congress is insuperable. It cannot avail appellant to set up the ten-year review provided by par. 18 and to urge that the Government "might well itself have appealed on the adequacy of relief" had it known in 1953 that par. 18 would be construed as it is now construed (Jurisd. St. p. 14). Under the strict measure of the Expediting Act the Government was surely not entitled to rely on the *assumption* that relief then denied would be granted ten years later.[4]

United States v. *Swift & Co.* 286 US 106, which the District Court followed, was known to the Government in 1953, and indeed represented the Government's success in preventing the relaxation of an antitrust decree at the suit of defendant. But whether or not the rule of that case should be applied unequally as between a Government application and a private application for subsequent modification of an antitrust decree,[5] the determination by the District Court in this instance that the position of gradual amelioration now existing is that which he foresaw and that the decree is working as intended, is conclusive. It is this cardinal feature of the case which must on jurisdictional grounds defeat this appeal deliberately postponed beyond the statutory limit (cf. Jurisd. St. pp. 13-4).

Brown Shoe Co. v. *United States* 370 US 294 (1962) impliedly decides the question here by holding that a decree

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[4]The Government citation of *Associated Press* v. *United States*, 326 US 1, 22-3 (Jurisd. St. pp. 13-4) does not assist its argument, because there the Government *did* appeal from the original decree. Particularly in view of the limitations of the controversy carried up on that appeal through the summary judgment (326 US at 5, 22), the statement of the Court cannot be taken as an invitation to a defeated party to postpone its appeal in the hope of some modification in future.

[5]The contention (Jurisd. St. pp. 15-7) that the Government is entitled to a discriminatory preference runs counter to *United States* v. *International Harvester Co.* 274 US 693, 702-3, 707.

of the trial court directing divestiture, even without the filing of the actual plan of divestiture, is final for the purposes of the Expediting Act (p. 305). The Court at pp. 306-11 devoted careful consideration to the indicia of finality under the Expediting Act, and took jurisdiction of the divestiture point with the statement that "Every prayer for relief was passed upon."

By exact parity of reasoning, the rejection by the trial court here of dissolution in 1953, bars the Government from again raising it through the piecemeal review here attempted. The question is foreclosed now because it was ripe for review in 1953 (370 US at 309). Congressional policy against piecemeal litigation forbids the sending up of a case in fragments. *Catlin* v. *United States* 324 US 229, 233-4.

In another aspect the order of April 11 1967 lacks the finality necessary for appeal because it merely re-affirms the 1953 decision on what was essentially a petition for rehearing and reversal of that decision. See *Conboy* v. *First National Bank* 203 US 141; cf. *Loeber* v. *Schroeder* 149 US 580; Note, "Appealability in the Federal Courts" 75 Harvard Law Review 351, 357.

II

THE QUESTIONS NOW TENDERED BY THE GOVERNMENT ARE SO UNSUBSTANTIAL AS NOT TO MERIT FURTHER ARGUMENT.

If this Court has jurisdiction of the appeal, it should affirm summarily for lack of any substantial question.

The question tendered by the appeal, according to the Jurisdictional Statement pp. 2-3, is whether the decision of the District Court, in denying a divestiture sought and denied 14 years earlier, "was based upon an erroneous standard for determining when the government is entitled

to further relief in Sherman Act cases, particularly since the original decree specifically contemplated future judicial consideration of its effectiveness". As we have shown (pp. 7-12 above), this is not the real issue raised on this record, in that the Government really seeks to resurrect a contention long ago denied and abandoned without appeal. Even in the light in which the Jurisdictional Statement tries to put it, however, the point brought up by the appeal does not deserve review.

(a) As a matter of substance the review sought by the Government would involve only a question of degree; that is, whether a process which has in ten years reduced defendant's market occupancy from 85% to 62% (266 F. Supp. at 331; Jurisd. St. App. A pp. 29-31), *and which is a continuing process,* is moving satisfactorily toward pure competition. This substantial diminution was accompanied by entries of competition which were substantial both by numbers of companies and by volume of offerings. We need merely refer to the painstaking and detailed findings of the 1967 decision (266 F. Supp. at 331-4; Jurisd. St. App. A pp. 29-36), which are inadequately summarized in the Jurisdictional Statement itself, to make the point that a trial court of unrivaled expertness and familiarity with the vast record of a complex subject-matter has determined the 1953 decree to have worked effectively and to have worked as intended.

The bland observation that "The public is entitled to the restoration of competition . . ." (Jurisd. St. p. 21) disregards both the explicit findings as to competition and the expressed satisfaction of the shoe manufacturers with the present workings of the decree (266 F. Supp. at 335; Jurisd. St. App. A p. 38). The Court explicitly noted that they are among the chief intended beneficiaries of the decree and they have had an unequalled opportunity daily to observe its effects in the last decade (*ibid.*).

The Jurisdictional Statement overlooks the fact that all the leasing and related practices condemned by the 1953 decree have been extirpated The original decree has been fully executed. It was on these alone that the original judgment of monopolization was founded, all other charges in the case having been dismissed with prejudice (p. 3 above). Hence the assertion in the Jurisdictional Statement that "United continues to enjoy a monopoly or near-monopoly position" (p. 18) is gratuitous and unfounded. The assertion by footnote that United's compliance with the decree lacks support in the record (Jurisd. St. p. 20) is contrary to fact: not only did United's report and the 14 days of testimony establish complete observance by United of the decree, but Government counsel, when questioned by the court whether any claim was made of violation by the defendant, replied in the negative (Tr. 231, 561-2, 583, 588-9).[6]

Emphasizing the insubstantiality of the matters tendered by this appeal is the acknowledged rule that the District Court has wide discretion and flexibility

> ". . . in molding the decree to the exigencies of the particular case. E.g., *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *International Salt Co.* v. *United States*, 332 U. S. 392."[7]

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[6]Other assertions in Fn. 13 (Jurisd. St. pp. 19-20) critical of the trial court's findings are not only further illustrations of the proposition that the present appeal centers on questions of measurement; but are in themselves erroneous. Thus the statement that "there was no evidence before the court regarding rates of return in other industries", overlooks the fact that the original voluminous record had such evidence in the testimony of Joel Dean and related exhibits (R. pp. 13010-13019 in No. 394 October Term 1953).

[7]This language comes from the Government's brief in this Court in No. 394 October Term 1953 at p. 159.

See also *Associated Press* v. *United States* 326 US 1, 22; *Timken Roller Bearing Co.* v. *United States* 341 US 593, 600-1; *Lorain Journal Co.* v. *United States* 342 US 143, 156.

(b) To the contrary of the contentions in the Jurisdictional Statement, the record made on the ten-year review by the District Court shows exact and full performance of the remedial measures directed to the only violations of the antitrust laws which that court found, and requiring elimination of the restrictive features of the leases, establishment of alternative sale provisions, and the like. The trial court's original determination that only the lease practices so corrected were defendant's offenses against the law as remodeled by the Alcoa and American Tobacco decisions (110 F. Supp. at 343-5) has been adopted by this Court's affirmance in 347 US 521, with its declaration that the findings were justified by the evidence and supported the decree. The standard for adequate relief of *United States* v. *Grinnell Corp.* 384 US 563, 577 (Jurisd. St. p. 13), is satisfied; the monopoly power as found by the District Court and by this Court has been dissipated.

(c) The suggestion in the Jurisdictional Statement that the District Court's application of the rule of *Swift & Co.* v. *United States* might impair effective enforcement of the antitrust laws (Jurisd. St. pp. 15-7) is quite unreal. The *Swift* case, as Judge Wyzanski remarked (266 F. Supp. at 330), has been followed consistently; and the standards laid down thereby, whether for a consent decree or for one entered (as this one was) at the end of strenuous litigation, are essential to the finality on which the right of appeal itself is founded. Par. 18 of the decree could not have changed that rule because, as the District Court itself pointed out, the effect would have been to render the 1953 decree non-final and non-appealable (266 F. Supp. at 330).

The Government tries to draw a highly semantic difference between past and present participles in par. 18 of the decree: that is, it contends that par. 18 contemplated that workable competition would have been established by 1965, whereas the standard now applied is how successful the decree has been in gradually eroding United's 1953 power to monopolize (Jurisd. St. p. 14). Here again the Government overlooks the fact that the decree has now completely destroyed the power to monopolize, as isolated and determined by the court in 1953 (p. 16 above). But as to the statement that, if the Government had understood the Court's present interpretation of the decree to be that which would be applied, "it might well itself have appealed on the adequacy of relief . . ." (Jurisd. St. p. 14), it clearly is mistaken. At least two of the attorneys who have signed the Jurisdictional Statement here also signed the brief in this Court in No. 394 October Term 1953, and presumably realized that the trial court had denied the claimed dissolution which they in 1953 considered an indispensable concomitant of the injunctive relief (p. 8 above). This Court's exercise of appellate jurisdiction cannot depend upon the subjective interpretation earlier placed upon decretal words by one of the parties. Moreover the distinction whether in 1953 the trial court intended its 1965 review to test a state of competition rather than a process of change is a most unsatisfactory basis for plenary review of the case in this Court. Nor could it be seriously contended that the Government's antitrust litigation program, or "the effective enforcement of the antitrust laws", turns on this Court's settling the true import of so special a clause as par. 18.

The District Court's expressed reservations of jurisdiction, through pars. 18 and 23 of the 1953 decree, neither enlarged nor limited its own power to modify its decree. The equity powers of the United States courts with respect to modifying their decrees are the same whether or not

reservations of this kind are expressed. As Mr. Justice Cardozo remarked in the *Swift* case 286 US at 114,

> "If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery."

The further reach of the Government's claim to modify the rule of the *Swift* case threatens serious unsettlement of the antitrust law. The market circumstances upon which adjudications are entered do not remain static thereafter. Evolution is continuous, conditions are bound to change. Yet the thrust of the Government's contention is that it at least, if not a private party, should be at liberty to re-open a decree entered after no matter how long a trial, upon proof of changed conditions that falls far short of the *Swift* standard of unforeseen and grievous effects. Under such a rule, litigation would never have an end. Such an outcome cannot be in the interest of justice or orderly antitrust administration. It would subvert the very purpose of the Expediting Act.

Conclusion

The appeal should be dismissed. Alternatively the District Court's order of April 11 1967 should be affirmed.

Respectfully submitted,

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October 4 1967

SUPREME COURT, U. S.

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MAR 13 1968
JOHN F. DAVIS, CLERK

No. 597

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED SHOE MACHINERY CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 597.

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED SHOE MACHINERY CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion and order of the district court denying the government's petition for modification (A. 73–83) is reported at 266 F. Supp. 328. The original opinion and decree of the district court is reported at 110 F. Supp. 295, and the *per curiam* opinion of this Court affirming that decree is reported at 347 U.S. 521.

JURISDICTION

The order of the district court was entered on April 11, 1967. The United States filed a notice of appeal on June 9, 1967. By order dated August 7, 1967, the lower court extended the time for docketing the ap-

peal to September 8, 1967, and the jurisdictional statement was filed on that date. Probable jurisdiction was noted on December 4, 1967. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *Brown Shoe Co.* v. *United States,* 370 U.S. 294; *United States* v. *E. I. du Pont de Nemours & Co.,* 366 U.S. 316.

QUESTION PRESENTED

Whether the district court's denial of a government petition for modification of a litigated antitrust decree, on the grounds that the decree was working as originally contemplated and that no grievous wrong evoked by new unforeseen circumstances had been clearly shown, was erroneously based upon an improper standard for determining when the government is entitled to further relief in Sherman Act cases, particularly since the original decree specifically contemplated future judicial consideration of its effectiveness.

STATUTE INVOLVED

Sections 2 and 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 *et seq.,* provide in pertinent part:

> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign na-

tions, shall be deemed guilty of a misdemeanor * * *.

* * * * *

Section 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 of this title * * *.

STATEMENT

I. THE UNDERLYING FACTS

This is a direct appeal from an order of the district court denying the government's petition to modify the antitrust decree entered in 1953 which resulted from a civil action brought against the United Shoe Machinery Corp. ("United") for monopolization of the domestic shoe machinery industry.

A. THE 1953 PROCEEDINGS

In 1953 the district court held that United had monopolized the manufacture of shoe machinery in violation of Section 2 of the Sherman Act, 15 U.S.C. 2 (110 F. Supp. at 343). It found that United "is supplying over 75%, and probably 85%, of the current demand in the American shoe machinery market" (*id.* at 339); that this constituted monopoly power; and, not being "economically inevitable," that possession of such power violated Section 2 (*id.* at 345). More specifically, the district court concluded that "the facts show that (1) defendant has, and exercises, such overwhelming strength in the shoe machinery market that it controls that market,. (2)

this strength excludes some potential, and limits some actual, competition, and (3) this strength is not attributable solely to defendant's ability, economies of scale, research, natural advantages, and adaptation to inevitable economic laws" (*id.* at 343).[1] The primary barriers to competition were found to be United's size, know-how, patents, servicing network, and the leasing system whereby United refused to sell many of its machines and required long-term leases which obligated the lessee to utilize United's machinery regularly and over a long period of time.[2]

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[1] The district court further noted (*id.* at 344): "To combat United's market control, a competitor must be prepared with knowledge of shoemaking, engineering skill, capacity to invent around patents, and financial resources sufficient to bear the expense of long developmental and experimental processes. The competitor must be prepared for consumers' resistance founded on their long-term, satisfactory relations with United, and on the cost to them of surrendering United's leases. Also, the competitor must be prepared to give, or point to the source of, repair and other services, and to the source of supplies for machine parts, expendable parts, and the like. Indeed, perhaps a competitor who aims at any large scale success must also be prepared to lease his machines. These considerations would all affect *potential* competition, and have not been without their effect on *actual* competition."

[2] In discussing the existing barriers to effective competition, the district court stated (*id.* at 343–344): "In estimating defendant's strength, this Court gives some weight to the 75 plus percentage of the shoe machinery market which United serves. But the Court considers other factors as well. In the relatively static shoe machinery market where there are no sudden changes in the style of machines or in the volume of demand, United has a network of long-term, complicated leases with over 90% of the shoe factories. These leases assure closer and more frequent contacts between United and its customers than would exist if United were a seller and its customers were buyers.

The district court stated the precepts underlying its decree as follows (*id.* at 346–347):

> Where a defendant has monopolized commerce in violation of § 2, the principal objects of the decrees are to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market.

The court declined at that time to order the relief requested by the government—that United be divided into three equal-sized shoe machinery manufacturing

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Beyond this general quality, these leases are so drawn and so applied as to strengthen United's power to exclude competitors. Moreover, United offers a long line of machine types, while no competitor offers more than a short line. Since in some parts of its line United faces no important competition, United has the power to discriminate, by wide differentials and over long periods of time, in the rate of return it procures from different machine types. Furthermore, being by far the largest company in the field, with by far the largest resources in dollars, in patents, in facilities, and in knowledge, United has a marked capacity to attract offers of inventions, inventors' services, and shoe machinery businesses. And, finally, there is no substantial substitute competition from a vigorous secondhand market in shoe machinery.

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"But United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United's own business policies. Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. The lease-only system of distributing complicated machines has many 'partnership' aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges. Moreover, the leasing system has aided United in maintaining a pricing system which discriminates between machine types."

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firms—and instead imposed a variety of conditions and restrictions upon United's activities designed "to recreate a competitive market" (110 F. Supp. at 347). These included requirements that United cease monopolizing the market; that United offer for sale, at comparable terms, all machines which it leases; that United lease machines for periods no greater than five years; that United not refuse to lease or sell machines to all prospective customers (except for good cause); that United dispose of its facilities for the manufacture or distribution of tacks, nails and eyelets; that United issue reasonable royalty licenses to any applicant on all patents then held by it; and that United not acquire any substantial shoe machinery manufacturer or manufacturer or distributor of supplies for shoe factories (see A. 2, 4, 5, 6).

Paragraph 18 of the decree provided that, ten years after its entry,

> * * * both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market. [110 F. Supp. at 354; A. 7.]

United appealed to this Court, attacking both the findings and the decree. No appeal was taken by the government. After oral argument, this Court affirmed in a *per curiam* opinion stating that the district

court's "findings are justified by the evidence and support the decree * * *" (347 U.S. 521).

B. THE 1965 PETITIONS

Acting pursuant to Paragraph 18, the United States reported to the district court, on January 1, 1965, that United retained a dominant share of the market and that workable competition had not been established in the shoe machinery industry, and accordingly petitioned for additional relief. United cross-petitioned to be relieved from certain restrictions of the decree.

In its petition for modification the government requested the district court to find that the decree "has not been effective in establishing workable competition in the shoe machinery market" and that United "still has and exercises monopoly power" in that market; to require United to submit a plan under which it would "establish an independent, full-line shoe machinery manufacturing company capable of competing with the defendant in the shoe machinery market"; to hold hearings to assure that such plan "is feasible and equitable, does not result in a forfeiture to defendant's stockholders, and promises a fair chance of said new company being able to survive and compete with defendant"; and to grant "such other and further relief as may be necessary to establish workable competition" in the market (A. 10).

United, on the other hand, asked for a "determination that workable competition in shoe machinery has now been established, for the vacating and setting aside of said decree accordingly, and for the entry of

an amended decree in the form annexed hereto" (A. 12). The amended decree proposed by United would have retained only the provisions requiring United to sell (on comparable terms) as well as lease its machines, to charge separately for installation and servicing of machines, and to avoid in its leases a full-capacity clause or other provision proscribed by the original decree (A. 13–14).

After a hearing, the district court, on April 11, 1967, denied both petitions (A. 84).[3]

C. UNITED SHOE MACHINERY CORP.

United is the largest manufacturer of shoe machinery in the world, and has been the dominant factor in the American shoe machinery market since 1899, when its corporate predecessor was created as an agglomeration of most of the significant American manufacturers of shoe machinery (110 F. Supp. at 299–300). Its market dominance was created and preserved by a series of acquisitions and mergers (*id.* at 312).[4] In 1950 it was primarily a manufacturer of shoe machinery and shoe supplies, with assets of about $105 million; its 1946–1950 earnings after taxes ranged between $6.2 million and $8.8 million (*id.* at 300).

By 1964 United had become a diversified company operating domestically and internationally through some 66 subsidiaries and affiliates which serve general

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[3] United has not appealed from the denial of its petition.

[4] See also *United States* v. *United Shoe Machinery Co. of New Jersey*, 247 U.S. 32; *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451.

industrial and consumer markets, as well as the footwear industry, in the United States and overseas. 1965 Moody's *Industrial Manual* 1200–1203. As of 1964, its assets totalled $232.5 million (*id.* at 1202), and its gross operating income from all sources was $208.7 million (*id.* at 1201). In addition to shoe machinery it also produces chemicals, industrial adhesives, sealants and coatings, fasteners, shoe boxes, box-making machines, brushes, and customer-specified metals and plastic products.

D. THE STRUCTURE OF THE SHOE MACHINERY INDUSTRY AFTER THE DECREE

The relevant product market, as defined in the district court's original opinion (110 F. Supp. at 302–303), included all shoe machines except dry-thread sewing and other machines not then offered by United. In the instant proceeding relating to modification, the market was broadened to include vulcanizing machines, which the court found to compete with newly developed injection-molding machines and other machines as a method of attaching soles (A. 76). The relevant geographic market has throughout been the entire United States.

As of 1953, United's share of the shoe machinery market by any measure was about 85 percent (A.76; cf. 110 F. Supp. at 339, placing United's share at "over 75% and probably 85%"). The decree began operating in 1955 (A. 1). The government's evidence showed that, as of 1963, there were approximately 100

firms in the shoe machinery industry, including 66 manufacturers (Pl. Exh. 69; A. 24–25),[5] 12 importers (Pl. Exh. 71; A. 27), and 22 second-hand dealers (Pl. Exh. 72; A. 28). Total industry revenues derived from the lease and sale of shoe machinery were $41.5 million (Pl. Exh. 73; A. 29). United's share was $25.8 million, consisting of $3.4 million in sales and $22.3 million in lease revenues, or 62.2 percent (Pl. Exh. 69, *supra*). United's largest competitor, International Shoe Machine Corp., had total revenues of $3.9 million; the next largest, Compo Shoe Machinery Corp., had revenues of about $3 million (Pl. Exh. 69, *supra*). United employed 21,285 persons, 6,375 of them in the United States. Compo employed 394 persons, while International employed 239 (Pl. Exh. 1; A. 15). No other shoe machinery manufacturer had sales in excess of $1 million, and only 16 had revenues in excess of $100,000 (Pl. Exh. 69, *supra*). The remaining 49 manufacturers were quite small; only two had more than 100 employees.

Of the 12 importers, whose combined revenues in

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[5] "Pl. Exh." refers to exhibits introduced by the government in the proceedings below. "A." refers to the printed joint appendix in this Court, in which certain of the government's exhibits are reproduced. "Tr." refers to the transcript of proceedings in the district court, begun on October 17, 1966, a copy of which is on file with the Clerk. Transcript references herein included are, for the most part, to where a particular exhibit not contained in the joint appendix was admitted into evidence.

1963 were only slightly over $1 million, only four had revenues in excess of $100,000 (Pl. Exh. 71, *supra*). The largest importer had 30 employees and none of the others had more than ten. The 22 second-hand dealers' total revenues were $3.4 million, but only one, Plymouth Machinery Company, had revenues in excess of $1 million, and only five others in excess of $100,000 (Pl. Exh. 72, *supra*). Plymouth had 25 employees, and the other dealers were considerably smaller. There was evidence that, because of the shoemakers' preference for leasing (A. 77–78), the supply of used machines to the second-hand market has been dwindling (Pl. Exh. 68, A. 23; Pl. Exh. 74, Tr. 557; see Tr. 258).

In its original opinion, the district court had determined United's market position from a survey of percentage shares of outstanding machines (110 F. Supp. at 303–307). In 1963, United accounted for approximately 84 percent of the 18 major machines listed in the original decree (Pl. Exh. 53, A. 22).[6] It shipped 65 percent of all major machines to shoe factories (Pl. Exh. 64, Tr. 388), and seven times as many machines of all types as its next largest competitor (Pl. Exh. 63, Tr. 388). It offered 115 types of machines while its largest competitor offered only 22, and most offered far fewer (A. 78–79).

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[6] United, according to its own sample, accounts for 100 percent of the injection-molding machines used in this country (Def. Exh. 60A, Tr. 1741). Injection molding is a new process of great commercial significance which substantially developed after the entry of the original decree (Tr. 89–90, 93; Pl. Exh. 29, Tr. 105).

In the district court's words, United is "without significant competition" in "certain sectors of the shoe machinery market" (~~J.S. App.~~ A. ~~35~~). There has been no development of any significant, full-line competitor (A. 80, 81), and United is presently the only company in the market manufacturing and offering a broad line of shoe machines (A. 78, 79). No independent shoe-machinery repair company has come into being since 1955 (Tr. 577).[7]

II. PROCEEDINGS IN THE COURT BELOW

A. THE PRE-TRIAL ORDER

After the filing of the cross-petitions for modification, the district court entered a pre-trial order specifying that the issues in the proceeding would, at least initially, be confined to certain matters as to which

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[7] United asserted in the court below that a sampling of the number of machines in manufacturers' inventories showed its market position to be between 52 and 57 percent and that there were no artificial barriers to entry into the industry. It also attempted to show, by a comparison of the revenue positions of 12 selected companies, that competition had been intensified because its total shoe machinery revenues had declined from $32.3 million in 1955 to $24 million in 1963, while its competitors' revenues had increased from $3.5 million in 1955 to $8.8 million in 1963.

The district court accepted these revenue figures, although they excluded United's income from conversion sales, which increased significantly in first year of the decree's operation (A. 71). Inclusion of revenues from parts and service, moreover, would have given United approximately the same aggregate shoe machinery earnings in both 1954 and 1963 (Pl. Exh. 68, *supra*; see note 11, *infra*). In addition, the court's finding that United's "12 most important domestic competitors" doubled their gross revenues between 1955 and 1963 (A. 77) is based

the court considered it appropriate to bring up to date the factual information previously available.[8] No other evidence was to be presented except as the court might specifically order. It expressly declined to consider any question of additional relief, stating that "[i]t is * * * inappropriate as of this time to offer any suggested program of divestiture, which if considered later in the hearings certainly will require a conclusive showing of the failure of the decree, as now

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upon a chart at page 15 of United's closing brief, which did not specify the 12 largest shoe machinery manufacturers in 1955 and which showed on its face that in 1955 several of the 12 companies either were not in the shoe machinery business or had revenues of unknown amounts.

[8] This pre-trial order is reproduced in the Appendix to this brief (pp. 53–55). In substance, in specifying and limiting the matters which the court regarded as appropriate for its consideration, the pre-trial order directed the parties to provide it with information which would include a census of machines, broken down in United and non-United machine types in the continental United States as of January 1, 1955, and January 1, 1965; general trends explaining any changes shown in the 10-year period; a comparison of the second-hand market at the beginning and end of the 10-year period; a description of changes in domestic shoe machinery demand and in the number and types of United and non-United equipment available; domestic shipments during 1964 for sale and lease by United, its domestic competitors and its foreign competitors, broken down by machine types; a general statement of net worth as of January 1965, annual net income as of 1963 or 1964, number of employees as of 1965, and machine types offered as of 1965, as to United and its domestic and its foreign competitors; a description of the effect of the decree on installation, construction, repair and other services; and a general description of significant developments during the last decade relating to shoe machinery patents, licensing, and challenges to patent validity or enforcement against infringers.

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operative, to have affected the goals originally contemplated" (App., *infra*, p. 55).[9] Discovery and the evidence at the hearing were limited to the matters specified in the pre-trial order.[10] Thus, the district court restricted its initial inquiry to whether any modification of the decree was required.

B. THE DISTRICT COURT'S DECISION

After an extensive hearing, the district court entered an order denying both petitions for modification (A. 84). Citing *United States* v. *Swift & Co.*, 286 U.S. 106, it stated that its original decree could not be changed unless the government made (1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions (A. 74). It found that Paragraph 18 of the decree contemplated nothing more than the application of this standard, and conferred no "broader power" on the court "to alter its decree (A. 74). The statement in Paragraph 18 that the decree should be evaluated in light of its "effect in establishing workable competition," the court said, "was unfortunate because it has no precise legal meaning" (*ibid.*). When read, however, in light of the original opinion, the court stated, "the object of the decree was, during a ten year pe-

[9] With respect to the relief issue, the district court expressly stated (App., *infra*, p. 55): "Nor has the Court presently any different view from the one earlier expressed as to the desirability, or lack of desirability, of radical schemes of divestiture of United so as to atomize the enterprise."

[10] However, the court permitted the government to introduce certain revenue figures as relevant to market shares (Pl. Exhs. 69, 71, 72, 73; A. 24–25, 27, 28, 29; see *supra*, pp. 9–11).

riod, *not to restore* so-called workable competition *but to move toward* establishing it" (A. 74) (emphasis added). Thus, "what the Court was inviting [in paragraph 18] was information as to how successful the decree had been in *gradually eroding* United's 1953 power to monopolize the market" (A. 74) (emphasis added). When it entered the decree, the court said, it "was quite cognizant of the fact that permitting United to continue as a single enterprise engaged predominantly in leasing rather than selling made it almost certain that at the end of a decade, absent a strong outside challenger, United's market power would be merely diminished not destroyed" (A. 75).

The district court made 16 findings of fact from which it concluded that its decree was working as it had contemplated. It found that United now received 62 percent of total shoe machinery revenues as against 85 percent prior to the decree (A. 76),[11] and that United's overall market position ranged between three-fifths and two-thirds, roughly 25 percent less than the share it had had in 1953 (A. 77). It viewed this decrease as satisfactory in the light of findings as to the growth of United's competitors, total ship-

[11] In finding that United's shoe machinery revenues had declined from $32 million in 1955 to $24 million in 1963, the court excluded from its computation United's income from conversion sales which ballooned in 1955, the first year of the decree's operation (A. 77). If it had compared revenues in 1954 (the year before the decree) and 1963, and had included revenues from parts and service, United's aggregate shoe machinery earnings would have been $35.6 million in 1954 and $35.4 million in 1963 (Pl. Exh. 68, *supra*).

ments, machines on lease, the condition of the second-hand market, and the entry of the new narrow-line companies. It found that United had no exclusionary power over minor machines (A. 80), and that if the shoe machinery industry were divided into seven sub-markets corresponding to the seven stages of shoemaking, it was not clear that United had a dominant position in the industry (A. 80, 81). Even if it did, the court found, this was not due to restraints of trade but to United's large volume, wide contacts, superior products, skill in merchandising, efficiency, inventions, and know-how (A. 81).

Additionally, on the basis of comparisons of sales and leasing revenues between 1953 and 1963, and numbers of machines sold and leased, and the fact that its competitors were growing, the court found that United's position in the market was declining (A. 81). All "artificial" barriers to entry had been terminated, it declared, and if competition was not flourishing in some sectors it is because no competitior with large financial resources had entered the market (A. 81). This was so, the court found, because the rate of return on shoe machinery is unattractive as compared with other machinery markets (*ibid.*).

Thus, the district court determined that the decree "has operated in the manner and with the effect intended" (A. 81), and is "still working at its long-range task of freeing the market" from United's monopolization and keeping the door open for "an

adequately provided challenger" (A. 83). Accordingly, it rejected United's petition as well as the government's, stating that "[u]ntil there are competitors throughout the market, the decree should stand unmodified" (*ibid.*). Since the court had initially decided to allow evidence relating to what sort of further relief would be appropriate only if it determined that some modification of the decree was necessary (*supra,* p. 14), no evidence in this regard was introduced.

SUMMARY OF ARGUMENT

I

Decisions of this Court have clearly delineated the principles underlying relief in a monopolization case. The decree should dissipate the monopoly power and establish effective competition in the particular market. Since the adjudication of an antitrust violation without effective redress is virtually meaningless, the achieving of these objectives is of great importance. All of this was plainly recognized by the district court in 1953 when it entered its original decree after concluding that United had monopolized the domestic shoe machinery market in violation of Section 2 of the Sherman Act.

A decree seeking to create competition in a monopolized market is necessarily based upon predictions of its likely effect in the future. Such predictions cannot consistently be made with assurance of their accuracy; thus an antitrust decree, particularly in a monopolization case, must be regarded as provisional in nature

and subject to modification upon a showing that it has failed to achieve its objectives after a reasonable period of time. Indeed, the need for such flexibility was recognized in the 1953 decree in which the district court not only retained jurdisdiction generally but specifically provided in paragraph 18 for reexamination of the decree's effectiveness after ten years.

II

Measured by established standards, the record in this case and the findings of the district court reveal that the decree has not worked adequately. United's monopoly power has not been dissipated and effective competition has not been established in the shoe machinery market. This is borne out by the fact that in major sectors of the shoe machinery market United faces no significant competition. Moreover, many of the barriers to new entry which were found in 1953 still exist, and are likely to continue in the future. Accordingly, modification of the decree is required.

III

Rather than applying the standards long recognized to measure the effectiveness of a monopolization decree, the district court erroneously held that it would modify the decree only upon (1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions, relying on *United States* v. *Swift & Co.*, 286 U.S. 106. Not only is the *Swift* standard inapplicable here; its rationale actually supports modification of the decree in this case. *Swift* involved an at-

tempt by antitrust defendants to escape from the restrictive provisions of a consent decree designed to prevent further monopolization. Here the government, representing the public interest, is seeking to have a litigated decree strengthened, not weakened, to assure vindication of the policies underlying the antitrust laws. Application of the *Swift* standard to such radically different circumstances misconstrues the meaning of that decision and ignores the public interest considerations which argued for a restrictive approach to modification there but support an expansive approach here.

Moreover, the district court erroneously supported its application of the *Swift* standard here by asserting that paragraph 18 of the decree conferred no broader authority upon it to modify than this Court found to exist in *Swift*. Despite the plain language of the 1953 opinion and decree to the contrary, the court maintained that all it intended was for the decree to be in the process of gradually eroding United's monopoly power during the 10 years prior to reconsideration. In effect, the Court's interpretation of paragraph 18 reads that provision out of the decree and adopts an improper standard for assessing the adequacy of decrees in monopolization cases.

IV

Since the district court applied an improper standard in determining that no further relief was necessary, remand of the case with directions to grant further appropriate relief should be ordered. No evi-

dence of various forms of additional relief was permitted under the court's narrow pre-trial order, and thus an evidentiary hearing on this question will initially be necessary. Since lesser remedies have proven inadequate, some form of relief affecting the structure of the market, which would involve divestiture of a portion of United's shoe machinery assets, seems presumptively required. There are various ways in which this might be done. If there are practical reasons why such relief would be inappropriate, the burden should be upon United to show this. Structural relief may be accompanied by certain other remedies. At all events, until a hearing is conducted on the question of additional relief, the prospects for more effective remedial action cannot be adequately evaluated.

ARGUMENT

I. IN ORDER TO RID A MARKET OF THE ADVERSE EFFECTS OF MONOPOLIZATION IT IS NECESSARY TO ERADICATE THE EXISTING MONOPOLY POWER AND TO ESTABLISH EFFECTIVE COMPETITION; A DECREE WHICH HAS FAILED TO ACHIEVE THESE OBJECTIVES AFTER A REASONABLE PERIOD OF TIME SHOULD BE APPROPRIATELY MODIFIED

In 1953 the district court held that United had monopolized the manufacture and distribution of shoe machinery in violation of Section 2 of the Sherman Act. That ruling, after plenary consideration, was affirmed by this Court. Two key facts found by the district court to support this conclusion were that United had a monopoly share of the market and had achieved and retained that position through behavior which, while not in and of itself illegal, was designed to exclude and discourage competition (110 F. Supp. at 343–344;

see note 2, *supra*). In reaching that result, the district court applied the established legal principles for determining whether monopoly power has been unlawfully acquired or maintained, and indicated an informed appreciation of the inherent dangers of monopolization.[12] Moreover, the court in 1953 showed a distinct awareness of the need to rid the market of both such power and the competitive barriers which it had created, stating (*id.* at 347):

> Dispersal of private economic power is thus one of the ways to preserve the system of private enterprise. Moreover, well as a monopoly may have behaved in the moral sense, its economic performance is inevitably suspect. The very absence of strong competitors implies that there cannot be an objective measuring rod of the monopolist's excellence * * *.

Initially, then, we turn to a consideration of the purposes and objectives of a remedial decree in a monopolization case.

Unless an effective remedy is provided, the mere adjudication of monopolization is virtually meaningless. Indeed, this Court has often pointed out that securing effective relief is the most important aspect of an antitrust case (*e.g., United States* v.

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[12] Language in the court's opinion is quite explicit in this regard, pointing out (*id.* at 347):

"* * * Concentrations of power, no matter how beneficently they appear to have acted, nor what advantages they seem to possess, are inherently dangerous * * *. Industrial advance may indeed be in inverse proportion to economic power; for creativity in business as in other areas, is best nourished by multiple centers of activity, each following its unique pattern and developing its own esprit de corps to respond to the challenge of competition. The dominance of any one enterprise inevitably unduly accentuates that enterprise's experience * * *."

United States Gypsum Co., 340 U.S. 76, 88–90), and has noted that the "remedial phase, more often than not, is crucial [because] the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it" (*United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 323). A district court therefore is charged with effectively terminating antitrust violations once it has determined their existence. As this Court stated, "courts are authorized, indeed required, to decree effective relief to redress the violations, whatever the adverse effect of such a decree on private interests" (*du Pont, supra*, 366 U.S. at 326).

Because of the critical importance of insuring that antitrust violations are adequately redressed, this Court has traditionally exercised broad reviewing authority over lower court decrees in antitrust cases. Thus, while the district court has "the responsibility *initially* to fashion the remedy" (*du Pont, supra*, 366 U.S. at 323), the decree formulated by the district court is not simply "subject only to reversal for gross abuse" (*Gypsum, supra*, 340 U.S. at 89), but is given "the most careful scrutiny [by] this Court" (*International Boxing Club* v. *United States*, 358 U.S. 242, 253; see also *United States* v. *Loew's Inc.*, 317 U.S. 38). When a petition to modify a decree, on the ground that it has failed to cure the underlying antitrust violation, is denied, there is similarly a compelling reason for close scrutiny and careful review by this Court. The crucial consideration at both stages—initial decree and petition for modification—is the

same—to assure that the violation found will be effectively remedied.

Because excessive market power lies at the heart of monopolization, eradication of that power is the primary objective of relief in a Section 2 case. This was recognized by the district court in its 1953 opinion, where it stated (110 F. Supp. at 346–347):

> Where a defendant has monopolized commerce in violation of § 2, the principal objects of the decree are to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market.

This approach is in line with the principles relating to relief in Section 2 cases which have often been enunciated by this Court. For example, in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577, it was stated:

> [A]dequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act. * * *

In other words, the decree should seek to "pry open to competition a market that has been closed by defendants' illegal restraints" (*International Salt Co.* v. *United States,* 332 U.S. 392, 401).

Thus, the stated purpose of the district court's decree in the instant case was to create workable competition and to put an end to United's monopoly

power. Monopoly power is obviously inconsistent with workable competition. The latter term, when used in the context of relief in a monopolization case, can only be read to describe a market where no competitor has a monopoly share[18] or the attributes of monopoly power, such as the ability to fix prices, control supply, exclude competitors, and inhibit innovation. Cf. *Grinnell, supra; Alcoa, supra.*

A decree in a monopolization case, in seeking to "break up or render impotent the monopoly power found to be in violation of the Act" (*Grinnell, supra,* 384 U.S. at 577) and deprive the violator of the benefits of its illegal conduct (*Schine Chain Theatres* v. *United States,* 334 U.S. 110, 128–129), is necessarily based upon a prediction of future conditions and circumstances, and the effect of the decree upon them. Thus, there can be no certainty that a decree will in fact prove to be wholly effective. This is especially so where, as in the instant case, the court eschews structural remedies, such as divestiture, which are quite likely to produce enhanced competition, and instead tries milder injunctive measures.

Indeed, the government originally requested dissolution of United into three equal-sized competitors, but the district court rejected that suggestion. Nevertheless, the government did not appeal from the district court's denial of such relief, but instead urged this Court to affirm the decree. In so doing, we

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[18] A monopoly share of a market is indicative of monopoly power prohibited by Section 2. See *United States* v. *Aluminum Company of America* ("*Alcoa*"), 148 F. 2d 416, 429 (C.A. 2); *Grinnell, supra,* 384 U.S. at 592–593.

pointed out that the district court had "proceeded on the premise that relatively mild remedies should be tried as a first resort, and that the possibility of more drastic measures should be held in abeyance" (see Brief of the United States, No. 394, 1953 Term, pp. 154–155). The district court also recognized the transitory nature of its decree. In rejecting a prohibition of all leasing of machines by United, it stated that such a restriction "would be undesirable, *at least until milder remedies have been tried*" (110 F. Supp. at 349; emphasis added).

In short, it could not be known with certainty whether the 1953 decree's provisions would prove to be sufficient. There was thus a compelling need for the district court to retain the broad power to modify that decree in order to ensure adequate redress of the violation. This need was clearly recognized in the 1953 decree; paragraph 18 (supra, p. 6) provided for a specific reexamination of the decree's effectiveness after a fixed period of time. The importance of preserving such flexibility has long been recognized in antitrust jurisprudence. In *United States* v. *Swift & Co.*, 286 U.S. 106, 114, this Court pointed out:

> A continuing decree of injunction directed to events to come is subject always to adaption as events may shape the need. * * * The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.

II. THE DECREE HAS FAILED TO ACCOMPLISH WITHIN A REASONABLE TIME ITS GOALS OF DISSIPATING UNITED'S MONOPOLY AND CREATING WORKABLE COMPETITION IN THE SHOE MACHINERY MARKET

It is clear upon the instant record, and under the district court's findings, that United continues to enjoy a monopoly or near-monopoly position in the shoe machinery market more than 10 years after entry of the original decree. Thus, the decree has failed to break up or render impotent United's monopoly power and establish workable competition in the relevant market. Under the proper standard for assessing the effectiveness of relief in monopolization cases, as developed in the cases discussed *supra*, pp. 21–25, the decree has not accomplished its intended objectives within a reasonable period of time.

In our view, the district court's most significant finding is that United presently controls between three-fifths and two-thirds of the shoe machinery market and receives 62 percent of total industry revenues (A. 76, 77). Such a dominant market share clearly indicates the retention of substantial market power, and is an unsatisfactory result 10 years after an adjudication of monopolization. Whether United could presently be found to possess monopoly power or not in a new proceeding is inconsequential. Here the original proceeding resulted in a determination that United had monopoly power in violation of the Sherman Act. A decree that has only reduced that power to a limited extent after a lengthy test period has proved to be inade-

quate. At the least, exploration of possible forms of additional relief is required.

Comparing United to the other companies in the shoe machinery industry reveals the scope of United's continued dominance. Only two of those competitors, International and Compo, have revenues in excess of $1 million, and their combined market shares in 1963 were considerably less than one-third of United's then-existing share of the market. The remaining companies in the industry were all extremely small (only 16 had revenues in excess of $100,000), and only marginal competition was offered by the 12 importers, of whom only one had revenues in excess of $1 million and only five in excess of $100,000. Second-hand dealers offer competition to United in a limited way, but innovation could render their inventory almost worthless and, in any event, they rely upon a supply of used machinery which has initially been sold by shoe manufacturers. Moreover, the supply of United machines available for the second-hand market has been continually declining since 1955 (see Pl. Exh. 68, *supra*), and cannot be rapidly altered to meet increased demands. Thus, the second-hand market, which at most comprises a marginal competitive threat, is likely to become increasingly less significant in the future.

The district court also found that none of United's competitors offered a broad line of shoe machinery. Even the two largest, Compo and International, offer only 22 and five types of shoe machines, respectively, and, as the court pointed out, "most companies [offer]

only 1" (A. 78, 79). When compared with the 115 types of machines offered by United on current terms and 24 types on application, as found by the district court, and the fact that of the 187 operations in domestic shoe factories, United was the sole source of supply for 45 (A. 80), the continuance of United's market dominance is evident.

The competitive situation in the shoe machinery industry is in many ways similar to the liquid bleach industry involved in *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 571. In that case, which involved the legality of the acquisition of Clorox by Procter & Gamble, the Court held that the presence of one giant company with a dominant share of a highly concentrated market in which all the other companies were quite small tended to inhibit competition and create high barriers to entry. This conclusion was reached although Clorox's share of the liquid bleach market, 48.8 percent, was considerably smaller than United's present share of the shoe machinery market. Of course, *Procter & Gamble* was a merger case and this Court analyzed the competitive effect in the light of Section 7 of the Clayton Act which "was intended to arrest the anticompetitive effects of market power in their incipiency" (*Procter & Gamble Co., supra,* 386 U.S. at 577). In the instant monopolization case the object of the decree is to reduce market power to the point that its anticompetitive effects will be removed. Howover, *Procter & Gamble's* teaching—that a market structure like that presently existing in the shoe machinery in-

dustry is seriously anti-competitive—makes it clear that such a structure should not be allowed to persist after an adjudication of monopolization under Section 2. As this Court observed in the *Swift* case (286 U.S. at 116):

> Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly, * * * but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past. * * *

The barriers to new entry into the shoe machinery industry were great in 1953 and, as revealed by the district court's opinion, continued to be great in 1964. One of the objects of the 1953 decree was to remove these barriers so that either by new entry or growth of established competitors United's market share and market dominance would be lessened to the point that vigorous competition could flourish. However, the district court's opinion catalogues at great length the continuance of significant barriers (A. 81):

> There is a variety of causative factors [for United's dominance] such as United's financial capacity to offer lease terms commercially equivalent to sales terms on the same machinery types, United's broad line of machine products manufactured in one plant (which permits United with economic advantage to supply machine types for which there is a small annual market and which also permits United to set for different types of machines terms which reflects different rates of profitability),

> United's constant contacts with most shoe manufacturers as a result of the large volume of machines United ships annually and the large number of leases it has outstanding, and United's excellent products, superior skill in merchandising, efficiency in administration, inventions and know-how. Every one of those factors was known to this Court when it entered its decree in 1953. * * *

In point of fact, the enumerated factors were not merely known to the court in 1953, but were specifically referred to at that time as both deriving from and serving to perpetuate United's unlawful monopoly (see note 2, *supra*). Thus, little has changed since 1953, despite 10 years of operation of the decree. Most of the factors that had been found at that time to be the source of United's power to prevent entry of new competitors still are present to a significant degree.

Nevertheless, the district court viewed the persistence of these barriers to entry as consistent with the purposes of its decree. It stated: "In the sectors where it [competition] is not flourishing, all artificial barriers have disappeared and the position enjoyed by United is chiefly traceable to the fact that it has not yet been challenged by a competitor of financial resources of any magnitude" (A. 81). By "artificial barriers" we assume the court meant those exclusionary practices which were found unlawful and which the decree enjoined. Even if the court were correct in concluding that such barriers to entry have

been eliminated, that fact is hardly conclusive with regard to whether the decree has been effective in achieving its purpose of establishing workable competition. If that goal has not been attained, it matters little that the barriers to entry which continue to exist are termed something other than "artificial". Section 2 of the Sherman Act prohibits monopolization, not just particular kinds of monopoly power which are grounded on certain factors.

To state that United's continued dominance results from its not being successfully challenged is but to pose the problem, not to answer it; more than that, it is virtually to acknowledge the ineffectiveness of the decree. If "artificial" barriers to new entry no longer exist, "real" ones appear to be present. In such a situation, there must be at least some consideration of different and further ways to deal with the continuing problem. The district court also stressed that United's "dominance is not due to 'restraints of trade' in the technical sense" (A. 81). Again, however, the absence of additional antitrust violations by United since entry of the decree is irrelevant to the basic question of whether the decree had successfully established workable competition.[14]

In addition, the district court stated that in certain sectors of the shoe machinery market "United was

[14] While the instant record contains no evidence of such violations by United, the court refused to hear evidence tendered to establish new or continuing restraints of trade (Tr. 36–37), at one point taking the position that the issue should be raised in an independent case (Tr. 110–111).

without significant competition, but it does not follow that United's position in those sectors was a result of United's exclusionary power or made competition unworkable'' (A. 80). Rather, the court ruled that "the want of competition was due to the absence of a challenger of adequate, ~~but not~~ unusual, financial resources, skill, ability, and efficiency'' (*ibid.*), and that "[t]he apparent reason why no such competitor has appeared is that compared with rates of return in other machinery markets, the rate of return in the shoe machinery market is unattractive'' (*id.* at 82). However, there was no evidence before the court with respect to rates of return in other industries, for the court's pre-trial order excluded such data. And even if the rate of return in the shoe machinery industry were shown to be lower than in other industries, other substantial entry barriers did in fact result from United's illegal monopoly power and largely contributed to the absence of new entry (see *supra*, pp. 29–30). Thus, such an analysis does no more than provide a partial *explanation* of why effective competition has not been established—not a *justification* for the unsatisfactory operation of the decree. Of course this factor might bear on the feasibility of various possible forms of further relief. But it can hardly support a conclusion that no further relief is needed.

As to the specific barriers to new entry discussed earlier (*supra*, pp. 29-30), the district court ruled that "[n]ew information with respect to the operation of those factors since 1953 shows that they have not in-

dividually or collectively had an unforeseen effect or worked a grave wrong'' (A. 81). This conclusion—which reflects the district court's misapplication of *Swift* (see *infra,* pp. 34–41)—is beside the mark. Had the district court in fact foreseen that the decree would not effectively remove entry barriers, it presumably would have entered a decree which promised greater success. Moreover, such a statement constitutes an explicit concession that these factors, which were found to contribute to United's unlawful monopoly in 1953, were perpetuated under and despite the decree. That they continued to operate to bar entry means only that the decree entered in 1953 has turned out to be inadequate. That this might have been foreseen in 1953 and that these factors might conceivably have had more serious continuing effects on competition provides no affirmative support for the decree's effectiveness in ridding the market of United's monopoly power.

In sum, the original decree has not accomplished the essential purpose of relief in monopolization cases, dissipating the monopoly power and establishing effective competition in the affected industry, for: (1) United's monopoly power was not broken up or rendered impotent with the passage of 10 years, (2) imposing entry barriers presented by that monopoly power in 1953 remained in existence 10 years later despite the operation of the decree, and (3) there was no indication that the decree in its present form would remove these barriers and open up the market.

to significant competition.[15] Indeed, the district court stated that "[u]ntil there are competitors throughout the market the decree should stand unmodified" (A. 83)—yet it is the inadequacy of the decree itself that largely has been responsible for the absence of such competitors. A holding that the decree has proved inadequate is thus required. In failing so to hold, and in refusing to consider modification of the decree, the district court, we submit, was in error.

III. THE DISTRICT COURT APPLIED AN IMPROPER STANDARD IN CONCLUDING THAT NO MODIFICATION OF THE DECREE IS NECESSARY

A. THE STANDARD FOR THE MODIFICATION OF CONSENT DECREES ANNOUNCED IN *UNITED STATES* V. *SWIFT & CO.*, 286 U.S. 106, DOES NOT APPLY WHEN THE GOVERNMENT SEEKS MODIFICATION OF A LITIGATED ANTITRUST DECREE

In refusing to consider what changes in the 1953 decree would be appropriate, the district court relied on *United States* v. *Swift & Co.*, 286 U.S. 106, for the proposition that the government could obtain additional relief to dissipate United's monopoly only if it made "a clear showing of * * * grievous wrong * * * evoked by new and unforeseen conditions" (A. 74). In so doing, we submit, the court applied an

[15] In this regard, the district court's reason for rejecting United's petition for modification should be noted: "United wants to adjust the decree on the ground that the purposes of the decree have been accomplished and milder restraints are now in order. But the premise is unsound. The decree is still working at its long-range task of freeing the market from all consequences of United's monopolization and keeping the door wide open for the arrival of an adequately provided challenger" (A. 83).

erroneous standard for determining whether a decree in a monopolization case should be modified. In our view, the language quoted by the district court from *Swift* has no application where the government, as the prevailing party in a litigated case, invokes the lower court's continuing jurisdiction to order additional relief on the ground that the orginal decree has failed to establish effective competition after a reasonable time.[16] Not only is the *Swift* decision distinguishable factually from the instant case, but its rationale actually lends support to the government's contentions regarding the need for modification of the 1953 decree.

It is initially important to note what *Swift* did, and what it did not, involve. The defendant meat packers in that monopolization case had consented to a decree enjoining them from selling meat at retail and from wholesaling or retailing in non-meat commodities. They had almost continually (though unsuccessfully) sought to have that decree vacated or attenuated by the courts (see 286 U.S. at 112–113). In rejecting the last such attempt, in which they sought to have the injunction modified to permit their wholesaling in grocery items, this Court stressed the remedial aspects of Section 2, noting (*id.* at 116):

> [S]ize carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past. The original decree at all events was framed upon

[16] Here the time period was expressly set by paragraph 18 of the decree which provided for evaluation of its effectiveness after the passage of 10 years (see *supra*, p. 6).

> that theory. It was framed upon the theory that even after the combination among the packers had been broken up and the monopoly dissolved, the individual units would be so huge that the capacity to engage in other forms of business as adjuncts to the sale of meats should be taken from them altogether * * *. It said that the privilege should be renounced forever * * *.
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> * * * * *
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> The question is not whether a modification as to groceries can be made without prejudice to the interests of producers of cattle on the hoof. The question is whether it can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect. * * * [*Id.* at 117–118.]

Thus, the *Swift* decree was designed to protect the interests of a number of groups adversely affected by the defendants' monopoly power, and, ultimately, to promote the public interest in viable competition—the function of all antitrust decrees secured by the government. The defendants had requested, over the government's opposition, that certain provisions to which they had consented and which were designed to protect the public interest, be revoked. In those circumstances, the Court refused to modify the decree absent a clear showing that the defendants were suffering a hardship of sufficient magnitude to outweigh the considerations of policy which supported a continuance of the decree's strictures.

Here, we have an exactly opposite situation—it is the government, as the prevailing party seeking to vindicate the public interest, which asks for modifica-

tion of the decree. All of the arguments against modifying the decree in *Swift* on the defendants' petition here militate in favor of the government's request for modification—*i.e.*, protection of the public interest is of paramount importance in determining whether additional relief should be considered.

Indeed, this Court's greatest concern in *Swift* was that a provision in an antitrust decree designed to protect the public interest should not be modified or expunged except in the most extraordinary circumstances. To apply this rationale as a ground for refusing to consider modification at the instance of the government, where the government's view is that the existing decree is not adequately protecting the public interest, stands *Swift* on its head. As the Court stated in *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 552, "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Thus, a significantly lesser showing than *Swift* requires is sufficient to obtain modification in the instant case. Here the government, which had prevailed on the merits, sought modification—not a private party subject to the decree, as in *Swift*. Here a decree obtained through litigation was involved, not a consent decree to which the defendants in *Swift* had agreed. Here the decree expressly contemplated a reconsideration of its effectiveness after a specific period of time; there was no such provision in *Swift*. In short, the *Swift* standard was enunciated in radically different circum-

stances, and has application where, but only where, a similar situation is presented.

In addition, the *Swift* opinion recognizes that changed circumstances may require modification of a decree which has proved ineffective.[17] As noted earlier (*supra*, p. 25), *Swift* pointed out that the lower courts have the duty of continuing "supervision of changing conduct or conditions" affecting decrees that are "provisional and tentative" in nature (286 U.S. at 114). See also *United States Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457, 464; *Hughes* v. *United States*, 342 U.S. 353, 357. Accordingly, and consistent with *Swift*, the proper test to be applied when the government requests modification of a litigated decree is not whether some unforeseeable turn of events has clearly rendered the original decree wholly inadequate. Rather, it is simply whether modification would serve to effectuate the basic but yet unrealized aim of the original decree, namely, to establish effective competition. By the very nature of the subject, decrees in Section 2 cases are not infrequently tentative and provisional. It is at all events clear that the decree in the instant case fits into that category, for by its terms it contemplated reexamination after a prescribed period of time (see *infra*, pp. 41–45). It is equally clear that the district court expressly recognized this when it entered the decree (see *supra*, pp. 5–6).

An example of the proper approach to take in a

[17] Indeed, this Court recently cited *Swift* in *Los Angeles Meat & Provision Drivers Union* v. *United States*, 371 U.S. 94, 103, for the proposition that "[i]f that situation should change in the future, the District Court will have ample power to amend its decree." See also *Associated Press* v. *United States*, 326 U.S. 1, 22–23.

case such as the instant one is provided by *Chrysler Corp.* v. *United States,* 316 U.S. 556, 563. That case involved consent judgments in parallel antitrust actions against Chrysler and Ford which provided that certain provisions would terminate unless similar relief was obtained by a stated date in a similar suit against General Motors. At the stipulated time the General Motors action was still pending and no relief had been obtained. In *Chrysler* this Court held that the district court had not abused its discretion by extending the time limit in the Chrysler judgment, stating: "We think that the test to be applied in answering this question is whether the change served to effectuate or to thwart the basic purpose of the original consent decree. *United States* v. *Swift & Co.,* 286 U.S. 106" (316 U.S. at 562).[18] Indeed, the instant case presents an even stronger basis for granting the government additional relief than *Chrysler* because (1) it involves a litigated rather than a consent decree;[19] (2) it involves the failure of the present decree effectively to cure the violation; (3) the govern-

[18] After another six years had passed with the General Motors proceeding still pending, an additional extension of the date in the Ford judgment granted by the district court was set aside by this Court because the government had not "sustained the burden of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated." *Ford Motor Co.* v. *United States,* 335 U.S. 303, 322. Ford would have been kept at a competitive disadvantage to General Motors, the industry giant, if the restrictions of the decree were permitted to continue (*id.* at 321). See Note, *Flexibility and Finality in Antitrust Consent Decrees,* 80 Harv. L. Rev. 1303, 1311–1314 (1967).

[19] Because both parties have agreed upon the terms of a consent decree, such as in *Swift* or *Chrysler*, it should not readily be modified at the instance of only one party.

ment is in no way responsible for the factual circumstances upon which the claim for additional relief is grounded;[20] and (4) the district court specifically provided in its decree for an evaluation of its effectiveness in the manner and at the time resorted to by the government.

If the stringent *Swift* test for modification is applied to the government, the effect would be to leave unchanged, unless there were an extraordinary change of circumstances, a decree which, within a reasonable time, had not satisfactorily rectified the antitrust violation and eliminated its anti-competitive effects. Such a rule would improperly and unnecessarily curtail judicial authority to deal adequately with the most crucial aspect of antitrust litigation—securing adequate relief. To be sure, modification to further the purposes of the decree may impose additional burdens upon the defendant. But those burdens are the consequence of the antitrust violation the defendant has committed. They could have been imposed in the original decree, and the defendant cannot properly complain if they are subsequently imposed when that decree proves inadequate. See *du Pont, supra,* 366 U.S. at 326.

Of course, it is desirable to avoid, if possible, continuing judicial supervision of business activity conducted under an antitrust decree. Cf. *United States* v. *Paramount Pictures,* 334 U.S. 131, 162–164. But that

[20] In *Chrysler* the government was of course a party to, and thus had some control over the progress of the General Motors case (see *Ford Motor Co.* v. *United States*, 335 U.S. at 321); no parallel circumstance is involved here.

policy must bow to the need for insuring effective relief in the particular case. See *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651. Neither *Swift* nor any other precedent requires the restrictive approach to modification of antitrust decrees adopted by the district court in the circumstances of this case. To the contrary, *Swift* teaches only that such modification should be sparingly granted where that approach is necessary for effective enforcement of the antitrust laws and adequate protection of the public interest. To turn *Swift* around and apply its standard in the instant case is to ignore the reasons of sound policy which supported a restrictive approach to modification there but militate in the opposite direction here.

B. THE DISTRICT COURT ERRONEOUSLY INTERPRETED THE PROVISION IN PARAGRAPH 18 FOR REEXAMINATION OF THE DECREE'S EFFECTIVENESS AFTER 10 YEARS

After determining that *Swift* severely limited its power to modify the decree, the district court ruled that paragraph 18 of the decree gave it no broader power. Although paragraph 18 explicitly provided for reexamination after ten years of the decree's "effect in establishing workable competition" (A. 7), the district court stated that its use of the phrase "workable competition" in 1953 "was unfortunate because it has no precise meaning" (A. 74). According to the court, "if paragraph 18 be read against the accompanying opinion * * *, it is apparent that what the Court was inviting was information as to how successful the decree had been in gradually eroding United's 1953 power to monopolize the

market" (*ibid.*). In other words, the court said, its opinion made it "plain that the object of the decree was during a ten year period not to restore so-called workable competition but to move toward establishing it" (*ibid.*). If this is all that the court intended the decree to accomplish, then it was seriously inadequate to redress the violation found in 1953, and there is now more, rather than less, need for modification.

Moreover, we believe that the district court's interpretation of the decree, and specifically of paragraph 18 thereof, is erroneous. In the first place, that reading substitutes for the plain meaning of the language of the 1953 opinion and decree—which the government relied upon in determining not to appeal and which this Court presumably relied upon as well in affirming—a contradictory and previously unarticulated standard for relief in monopolization cases. More importantly, the present view of the court below is inconsistent with the accepted standards governing the scope of antitrust relief, and would have been equally so in 1953. In addition, such a reading wrenches paragraph 18 almost wholly out of the context in which it was written, and renders it essentially meaningless.

As noted previously (*supra*, p. 5), the 1953 opinion and decree recognized that in order to rid a market of the effects of monopolization it is necessary to dissipate monopoly power and establish effective competition. Read in the light of these objectives, the plain purpose of paragraph 18 was to set a reasonable time period in which to permit the decree to cure the violation; if it did not do so during that period, that provision plainly contemplated modification of the decree to provide further, effective relief.

The fact that the district court did not phrase paragraph 18 in exactly these terms but instead used the term "workable competition" did not change the stated and clearly understood purpose of that provision. It is of course true that the phrase "workable competition" cannot be given a precise definition that would be universally accepted. However it might be defined, one thing seems quite clear: the term is not synonomous with "workable monopoly" and the gradual erosion of monopoly power does not, in anyone's language, mean that "workable competition" has been effectively established in the industry. In our view, the phrase "workable competition" in paragraph 18 must be read as meaning nothing more—and, more significantly, nothing less—than the achieving under the decree of the commonly understood policy objectives of Section 2.[21] It called for a deter-

[21] A similar inquiry was undertaken by the district court in the *Alcoa* case where the result sought to be attained was phrased slightly differently—*i.e.*, "effective competition." *United States* v. *Aluminum Company of America*, 91 F. Supp. 333 (S.D.N.Y.). In *Alcoa* the court examined market shares, industry trends, competitive dynamics and entry problems in ascertaining whether or not unlawful monopoly power had been terminated and substantial or effective competition had been created.

See also *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 176, quoting from Report of the Attorney General's National Committee to Study the Antitrust Laws, 320 (1955):

> The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new or potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements * * *.

mination whether, after 10 years, the decree had accomplished its purposes—not whether it was gradually moving toward its objectives.

Provisions for reexamination constitute an important element of antitrust relief, for they serve to delineate the timing and manner of checking the court's predictions, as reflected in the original decree, against observed economic developments. Such provisions, if selectively used in particular cases where relief questions are complicated and difficult, permit a desirable degree of flexibility on the part of antitrust enforcement officials as to the nature and scope of relief sought initially. This is especially so in monopolization cases, where relief questions are seldom easy. Such provisions measurably assist lower courts in designing effective, but not unduly or unnecessarily harsh, remedies, and tend to reduce the necessity for appeals by the government concerning the adequacy of relief. But to accomplish their purpose such provisions must be interpreted according to their plain intendment.

In short, paragraph 18 cannot simply be written off as adding nothing to the district court's general authority to modify the decree. It means what it says, and should be taken at face value. As we have demonstrated (*supra*, pp. 34–41), the *Swift* standard is inapplicable where the government seeks modification of a litigated antitrust decree. This is particularly so where the decree, in addition to containing a general retention of jurisdiction to modify, includes a specific provision such as paragraph 18. To reject the empirical evidence which paragraph 18 plainly contem-

plated would be the basis for determining the need for modification makes reconsideration in the light of experience meaningless and in effect reads that provision out of the decree.

Finally, the district court apparently gave undue weight to its denial of divestiture in 1953. In concluding its opinion, the court stated (A. 82):

> It may have been an error in 1953 not to have dissolved United rather than to allow sectors of its power to be dissipated by small competitors, and to leave other sectors of power to be effectively attacked only when a small competitor became large or a large competitor appeared. But the choice was made in 1953 for reasons already adequately explained.
>
> What the Government is complaining of is not that the decree did not work as expected, but that working in the foreseeable and intended way the decree did not accomplish what the Government had originally prayed for and which this Court had rejected. In short, the Government petitions that the decree be reversed because this Court erred in 1953. On the authority of the *United States* v. *Swift & Co.*, 286 U.S. 106, 119, the Government's petition is denied.[22]

[22] In this regard, it should be noted that the district court stated on one occasion (Tr. 40–41): "I have tried repeatedly in pretrial sessions to explain what I regarded as the narrow scope of what was open to you under Paragraph 18 of the decree. It is not my intention to allow this case to develop into a retrial of what was tried a decade and a half ago.

"Paragraph 18 of the decree was not proposed by either party; it was my own insertion in the decree. All that I ever

But the question presently is not whether "[i]t may have been an error in 1953 not to have dissolved United," but whether in light of the decree's lack of success in dissipating United's monopoly power, that determination requires reexamination 10 years later. A similar approach was also reflected in the district court's pre-trial order.[23] Thus, it seems clear that the district court viewed the government's modification petition as little more than an untimely attempt to attack the 1953 decree.

In our view, the district court's suggestion that the government is attacking the result reached in 1953 misses the crucial point in this case. When the decree—which was reasonably supported by the facts available when it was entered—is viewed in the light

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contemplated was the most general review. If anybody thinks I am prepared to have a full-scale trial here, he is much mistaken. All that I intend to do is take a quick look to see whether there was a manifest error committed by this Court in 1953."

[23] In the pre-trial order the court stated (App., *infra*, p. 55):

"Nor has the Court presently any different view from the one earlier expressed as to the desirability, or lack of desirability, of radical schemes of divestiture of United so as to atomize the enterprise. It is, therefore, inappropriate as of this time to offer any suggested program of divestiture, which if considered later in the hearings certainly will require a conclusive showing of the failure of the decree, as now operative, to have effected the goals originally contemplated."

of 10 years' working experience, we are in a position to answer the critical question whether it has operated as it should have to accomplish its intended objectives. Yet, the question asked and answered by the district court, in essence, was whether the relief appeared adequate at the time the decree was entered.

IV. THE CASE SHOULD BE REMANDED WITH DIRECTIONS THAT THE DISTRICT COURT GRANT SUCH FURTHER RELIEF AS IS NECESSARY TO ESTABLISH EFFECTIVE COMPETITION IN THE SHOE MACHINERY INDUSTRY.

As the foregoing discussion makes clear, the failure of the injunctive provisions of the original decree to establish effective competition in the shoe machinery industry after a full decade indicates that more effective measures are now necessary. Since mere changes in United's restrictive practices, under the original decree, have not done the job, the district court should now consider more direct measures which will deprive United of the benefits of its past illegal conduct and break up its monopoly position. But because of the way in which the court chose to proceed (see *supra*, pp. 12–14) and its finding that no modification of the decree was necessary, no evidence relating to the question of additional relief has been introduced. It is therefore necessary, before the decree can be modified, to hold a hearing, preceded by discovery, to receive

and assess such evidence. See *Hughes, supra.* There is, however, no reason for the district court to reconsider any other aspects of this case. A remand should accordingly be limited solely to the question of what modifications of the decree would be necessary and appropriate to accelerate the elimination of United's dominance and to establish effective competition in the industry.

Since there has been no hearing on additional relief and since the relief question may be complicated by factors such as United's single-plant operation, it seems appropriate at this time only to "tentatively suggest rather than to specifically demand definite and precise remedies" (*United States* v. *American Tobacco Co.,* 221 U.S. 106, 186). It is our view that the guiding principle in disposing of this case must now be that, when injunctive provisions have been given a fair opportunity to dissipate unlawful monopoly power and the monopolist nonetheless retains market dominance, there should be a presumption in favor of remedies designed to change the structure of the industry—*i.e.,* some form of divestiture. Indeed, in view of the history of this case and the present state of the industry, we believe that, at least *prima facie,* a need for divestiture of a portion of United's shoe machinery assets has been demonstrated.

We of course do not suggest that structural remedies ought not to be utilized initially in Section 2 cases. Cf. *Grinnell, supra.* Rather, our point is only that if such remedies are not so employed, the demonstrated failure of less stringent relief makes them presumptively appropriate at a later date. Thus, al-

though the district court in denying divestiture in 1953 relied on the fact that United produced all of its shoe machinery in one factory, this factor cannot be permitted to foreclose for all time any consideration of structural relief. For example, United's roof may in fact cover a multitude of quite separable operations and the adverse impact of partial divestiture may not be great; or without disturbing existent plant facilities, United may be required to establish a new competitive entity.

Since market power is often closely related to dominance in productive capacity, one of the most effective means of diluting that power is to convert part of the capacity into a new source of competition. See *Alcoa, supra.* Relief designed to change the structure of the market, including divestiture, should now be withheld only if it is established that such relief would frustrate the goals of the litigation by causing a net impairment in the long-run performance of the shoe machinery industry as a whole or by working an undue hardship upon the American shoe manufacturing industry, which would be an important beneficiary of the effective functioning of the shoe machinery market. Hardship to United itself should be no bar to effective relief (see *supra,* p. 40). Whether there are facts that would overcome the presumption in favor of partial divestiture or other structural relief cannot be known until a full record has been developed in the district court.

At least two possible methods of divestiture immediately suggest themselves: (1) requiring United

to sell part of its shoe machinery manufacturing assets to another company, or (2) requiring United to create an independent company to manufacture shoe machinery.[24] The problems and virtues in each can only be assessed after the full evidentiary hearing we propose. We of course recognize that the district court in 1953 rejected a suggestion that United be dissolved into three manufacturing concerns because it considered that proposal to be impractical (110 F. Supp. at 348–349). But practicality is relative to what lesser measures can achieve and have in fact accomplished. Since provisions short of divestiture have proved unsuccessful, it is appropriate—indeed, in our view, essential—to reconsider some form of structural relief.

Other kinds of relief might be utilized if those suggested above should not prove practicable. As we indicated in our Jurisdictional Statement (pp. 22–

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[24] In the government's petition for modification (*supra*, p. 7) it was suggested, as to additional relief, that United be required "to submit to the Court a plan, pursuant to which the defendant shall establish an independent full-line shoe machinery manufacturing company capable of competing with the defendant in the shoe machinery market," and requested "such other and further relief as may be necessary to establish workable competition in the shoe machinery market." We do not view the suggestion that United be required to establish a competing company as the only suitable form of further relief. Nor was that our intention when the petition for modification was filed, notwithstanding the district court's apparent view to the contrary (see *supra*, pp. 13–14). Rather, that suggestion was one made at the initiation of the instant proceeding and simply represents one form of the basic additional relief which the government views as, at least *prima facie*, necessary and deserving of thorough exploration.

23), a new competitor might be created from one of United's present divisions, with the requirement that United transfer to that company sufficient productive assets, patents, technological know-how and personnel to enable it to begin successful operations. Or United's British subsidiary, if separated from its parent, might become an important actual or potential competitor in the American domestic market. Its entry might be expected to motivate existing companies in the market, including United, to more efficient performance, particularly in regard to the development of new machines. Other possibilities for some form of structural relief may be developed during the district court's exploration of the question. If there are substantial economic or practical reasons why such relief is not feasible, considering the present state of the industry or United's existing organization, the burden should be upon United—not the government—to establish this at the hearing. At all events, until an evidentiary hearing is held on the question of additional relief, the prospects for more effective remedial action cannot be adequately evaluated.

Finally, we note that the passage of time has rendered the decree much weaker than when it was entered. While it requires mandatory licensing of all patents held by United in 1953, most of those patents must have expired in the intervening 15 years. Therefore, United may now be able to utilize new patents, as in the past, to exclude competition and to solidify its control of the market. Thus, modification of the decree may also require the updating of certain provisions,

such as those governing patent licensing,[25] so as to minimize barriers to entry and stimulate competition from existing companies.

CONCLUSION

For the reasons stated, the order of the district court should be set aside and the case remanded for the formulation of additional relief which will expeditiously establish effective competition in the shoe machinery market.

Respectfully submitted.

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JANUARY 1968.

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[25] This could be accomplished by requiring United to make available to other companies in the industry, on a reasonable royalty basis, all of its present and perhaps later-acquired patents for a reasonable period of time.

APPENDIX

PRE-TRIAL ORDER NO. 1

July 19, 1965

WYZANSKI, J.

A hearing having been held on June 25, 1965 with respect to various proposed pre-trial orders, and opportunity having been given to the parties and to amici curiae to file written statements, it is now ORDERED that

A. Issues to be considered at the hearings in this case will be confined to testimony, stipulated in so far as practical, with respect to the following 11 matters:

1. With respect to each type of machine manufactured by United, the number of machines in the Continental United States known to have been outstanding as of some date shortly after the effective date of the decree, say, for example, January 1, 1955, such machines to be shown as either (1) sold and supposed to be in use, or (2) leased.

2. The same sort of facts as of approximately the same date with respect to machines not of United manufacture, whether domestic or foreign. (If necessary general estimates will suffice.)

3. The same sort of facts with respect to United machines as of approximately January 1, 1965. (If inventories were taken at some date other than the first of the year, this will be satisfactory.)

4. The same sort of facts with respect to non-United machines as of a date close to that used in the previous paragraph.

5. Any general trends explaining the changes shown between 1 and 3, and between 2 and 4. Such trends to be described in a broad way, not necessarily on an annual basis.

6. A general comparison of the second-hand machinery market as of approximately January 1, 1955 and as of approximately January 1, 1965.

7. A general description of changes during the last decade in demands and requirements of the domestic shoe manufacturing industry for machines for shoe production; and changes in the number and types of United and of non-United equipment available.

8. Shipments to Continental United States shoe factories during 1964 for (a) sale and (b) lease by (a) United and so far as available, (b) United's domestic competitors and (c) United's foreign competitors. Such shipments, so far as possible, should be broken down according to type of machine.

9. A general statement of the net worth, as of approximately January 1, 1965, the annual net income in 1963 or 1964, the number of employees as of approximately January 1, 1965, and types of machines offered as of approximately January 1, 1965 of (a) United and, so far as available, (b) United's domestic competitors and (c) United's foreign competitors.

10. A general description of the effect of the decree provisions relative to the rendering of installation, instruction, repair and other services.

11. A general, and not in any sense a detailed, description of any significant developments during the last decade in the issuance of shoe machinery patents, or licensing of such patents, or challenges to their validity, or ef-

forts in or out of court with respect to their enforcement against asserted infringers.

B. No matter outside of those eleven matters will be considered by the Court except after a specific preliminary finding that such an excursion is necessary to achieve justice.

C. This case will be heard solely with respect to progress made under this Order, September 17, 1965, unless postponement for good cause is necessary. Proceedings at a later date will follow the usual course of affording the right to proceed first to the Government, second, to the amici curiae in so far as the Court deems presentation by them in the interest of justice, and third, to United. Whether rebuttal will be proper cannot now be determined.

D. It is the Court's present view that the testimony should be largely based on stipulated facts, and that there should be no occasion for an extensive program of hearings, inasmuch as the Court, considering the growth, or lack of growth, of legal principles during the last decade, chiefly desires an updating of factual information previously available. Nor has the Court presently any different view from the one earlier expressed as to the desirability, or lack of desirability, of radical schemes of divestiture of United so as to atomize the enterprise. It is, therefore, inappropriate as of this time to offer any suggested program of divestiture, which if considered later in the hearings certainly will require a conclusive showing of the failure of the decree, as now operative, to have effected the goals originally contemplated.

CHARLES E. WYZANSKI, Jr.,
United States District Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 597

UNITED STATES OF AMERICA,
Appellant,

v.

UNITED SHOE MACHINERY CORPORATION,
Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR RESPONDENT UNITED SHOE MACHINERY CORPORATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, *Appellant*, v. UNITED SHOE MACHINERY CORPORATION, *Respondent*.	No. 597

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR RESPONDENT UNITED SHOE MACHINERY CORPORATION

Opinions Below, Jurisdiction, Statute Involved

These matters are set forth in the Government brief pp. 1-3.

Question Presented

Where a 1953 decree (affirmed by this Court) finding monopolization and prescribing remedies has been fully complied with by the defendant, and substantial and continuing progress is being achieved both in reducing defendant's market occupancy and in introducing new competition in the manner and at the rate intended by the trial court, was it error for the trial court to decline a Government request,

which had been rejected in 1953, for additional and more drastic relief?

Additional Statement of Fact

The following additions to the Statement in the Government brief pp. 3-6 are necessary for proper understanding of this appeal:

A. 1953 Proceedings

1. The decree which this Court affirmed, 347 US 521, was entered after a trial of "prodigious length" which occupied 121 hearing days, covered 14,194 pages of transcript and produced 26,474 pages of exhibits in addition to 150,000 pages of United machine reports, 6,000 copies of patents, and 2,122 pages of depositions. The extensive findings, opinion and decree of the trial judge at pp. 297-354 of 110 F. Supp. were extolled in the Government brief on United's appeal to this Court (No. 394 October Term 1953, pp. 154, 156) with phrases like—

> "the careful consideration which underlies the provisions for relief" and
>
> "the logic, the clarity and the meticulousness of the opinion on remedy, and of the decree itself".

2. The trial court found that by far the most important means by which United achieved its 1953 share of the market and its then market power was that set of transactions in 1899 by which it brought under one corporate control the business of six constituent companies (110 F. Supp. at 307). As held by the trial judge in the decision which this Court affirmed, those transactions had already been adjudicated in favor of United in cases which came to this Court. *United States* v. *Winslow* 227 US

202; *United States* v. *United Shoe Machinery Co.* 247 US 32. The decree under review concerned itself exclusively with how United's market power had been maintained and exercised since those adjudications (110 F. Supp. at 307).

3. The 1953 findings contained a careful summary of shoe-making processes in force at that period, with the description of the 18 principal processes most of which involved distinctive operations in lasting or sole-attaching or both (110 F. Supp. at 300-1). The court observed that shoes for every known use are manufactured by more than one principal manufacturing process, and that each shoe manufacturer may vary the operations used in the various processes according to his preferences, the materials used, the type of shoe and many other variables (110 F. Supp. at 301). The court found that shoe manufacture is a long chain of detailed operations, each preparatory to a succeeding operation and often requiring individual correction or adjustment (*ibid.*). The process of shoe manufacture is different from the usual fabrication and assembly process current in many other types of manufacturing industry (*ibid.*).

There is no standard set or number of shoe machines which every shoe manufacturer must have; he not only has personal choice as to which process, processes or subprocesses he will use, but he has wide choice as to whether a particular operation will be performed by hand or by one or another type of machine (110 F. Supp. at 301-2). The concept of "shoe machinery" includes complicated relationships between different types of machines: some are parallel to other types; some are sequential to other types; occasionally a pair of types which are competitive when used in two different shoe manufacturing processes, are complementary when used in a single shoe manufacturing process (*id.* at 302). The court also portrayed the complexity of various

machine types, the engineering skill required in the design, the interdependence of machine operations in each factory, and the excellent performance of the United machines (*id.* at 302, 331, 339-40). Thus, the peculiar technology or technologies of shoe manufacture affect the nature of the market in each shoe machinery manufacturer's attempt to place his equipment.

The findings enumerated the 18 principal machine types and the 12 subordinate types as of 1947, with the percentages of United occupancy in each as indicated by United's internal machine reports and depositions on a random sample (*id.* at 304-6). It was from these data that the court in 1953 concluded United to be the supplier of 75% to 95% of the total current demand for shoe machinery exclusive of dry thread sewing machinery (*id.* at 307). This it found to be somewhat less than the share United was supplying in 1915 (*id.* at 339).

4. The trial court found the three principal sources of United's power in 1953 to have been the original constitution of the company, the superiority of its products and services, and the leasing system (*id.* at 344). It held the first two of these plainly beyond reproach, pointing out that the original constitution of the company was judicially approved by this Court in 247 US 32 and must be regarded as protected by the doctrine of *res judicata* (*ibid.*). In the decision which this Court affirmed the trial court also held that under the rule of the *Aluminum* case, 148 F. 2d at 430, such part of United's market power as rested on the high quality of its products, its understanding of shoe manufacture, its efficient design and improvement of machines, and its efficient repair service, was also beyond legal criticism (110 F. Supp. at 344). The trial court also found that United's leasing practices served the purpose of establishing ease of entry in the shoe manufacturing field, so that many

of the larger manufacturers, who collectively accounted for 40% of domestic shoe production in 1953, started in a small way and expanded under the leasing system (110 F. Supp. at 323). However, the court held certain aspects of the leasing system to have been illegal. The injunctive and remedial actions of the court were directed to the removal of restrictions from the leases, imposing a requirement of sale, instituting separate charges for service, prohibiting purchases in the second-hand market, opening patents to license, and terminating United's manufacture and distribution of tacks, nails and eyelets.

5. In setting forth the remedies which it deemed necessary to correct the conditions complained of in the original case, the Government requested not only the injunctive relief above described but in addition the dissolution of United into three machinery companies, which it claimed to be "a practical necessity for the emergence of competitive conditions in the shoe machinery industry" (Brief of United States on Relief, p. 46). The trial judge considered this proposal and rejected it as unrealistic and impracticable (110 F. Supp. at 348). He pointed out that United conducted all machine manufacture at a single plant in Beverly, Mass., with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force; and that no means existed of dividing these facilities or converting them into three factories. He explained the principle of relief as an elimination of lease restrictions and the encouragement of a second-hand market through the requirement of alternative sale. From the second-hand market the court expected a type of substitute competition to arise which would "gradually weaken" United's market power (*id.* at 350). The second-hand market and elimination of the lease restrictions were expected, in combination, to "gradually diminish the magnetic hold now exercised by

. . . the partnership features of the leasing system" (*ibid.*), so that competition might come in as United's relationships with customers grew feebler.

6. The relief selected was carefully designed to fit the nature of the shoe machinery market (excluding dry thread sewing machinery), which, the court found, had special characteristics distinguishing it from other markets (*id.* at 301-3). The court's expectations that the workings of the shoe machinery market would accomplish the purposes of the relief provided were based upon its description of shoe-making processes and shoe manufacture set forth at p. 3 above.

B. 1967 Proceedings

In his review of the operation of the decree pursuant to paragraph 18, Judge Wyzanski, the original trial judge, gave full scope to the parties to show the condition of the shoe machinery business as of January 1 1965, designated as C-Day.

1. His pre-trial order (attached to the Government brief) followed the framework of the earlier decision, was keyed to the essential findings of the original decision, and invited evidence upon the "*changes* during the last decade in demands and requirements of the domestic shoe manufacturing industry for machines for shoe production; and *changes* in the number and types of United and of non-United equipment available" (emphasis supplied). This order provided that no program of divestiture need be offered until a conclusive showing had been made "of the failure of the decree, as now operative, to have effected the goals originally contemplated".

2. Pursuant to the court's direction, numerous pre-trial proceedings took place, including conferences and copious

correspondence between the parties with a view to the stipulation of the evidence so far as possible. Seven written stipulations of evidentiary material were entered into. In addition the testimony of 29 witnesses was taken.

3. The hearings on this review were extensive and included economic evidence on changed competitive conditions in the industry, including machine distribution, manufacturing processes, market share, ease of entry, and new technical developments. On this survey of ten years' operation of the decree, the district judge who had acquired unique familiarity with the shoe machinery industry, concluded that the decree affirmed by this Court was operating in the manner originally intended, and declined to modify it.

C. Findings with Respect to Operation of Decree

As to the issue before him under paragraph 18 of the decree, with respect to its effect in establishing workable competition, Judge Wyzanski pointed out that this language when read against the original opinion called for information as to how successful the decree had been "in gradually eroding United's 1953 power to monopolize the market." 266 F. Supp. at 330, A. 74 (cf. ". . . gradually weaken the prohibited market power which it now exercises", 110 F. Supp. at 350). He said the object of the decree was "not to restore so-called workable competition but to move toward establishing it" in the ten-year period (*ibid.*).

After summarizing the facts of which the court was aware in 1953, Judge Wyzanski compressed the extensive evidence of what the decree had accomplished, the dynamics of the 1963-4 shoe machinery market, customers' freedom of choice, and competitors' freedom of movement, into 16 findings detailed at pp. 331-4 of 266 F. Supp., A. 76-81. Salient in the findings are the following points:

1. United complied fully with the decree. (Finding 1)

2. Its share of the shoe machinery market has declined in the ten years from about 85% to about 62% (by a revenue measure, including rentals and unit charges received on machines shipped in earlier years) or 48% (by a value of actual shipments measure). (Findings 2, 13) [This share, stated as of 1963, has since dwindled and is still dwindling.]

3. The shrinkage of United's market share during the 1953-1963 period by between 25% and 40% is confirmed by many factors. These include the decline of United's shoe machinery revenues by one-quarter as against the doubling of gross revenues of its 12 most important domestic competitors; the reduction by almost half of the earnings before taxes of United's Shoe Industry Group, after elimination of proceeds from conversion sales;[1] the decline in United's employment by 30% in its factory and 40% in its service branch; and the decrease of shoe machinery shipped to 51.7% in 1963. (Finding 5)

4. At the end of the period there were about 126 suppliers of new shoe machines, and the pace of entry into the market regularly increased in each three-year period after the decree: from 11 to 19 to 26, or a total of 56 companies. New entrants can participate effectively in one or several parts of the industry without participating in other parts. (Finding 10)

5. The number of United shoe machines on lease in domestic shoe factories has fallen from 91,000 to 26,000, so that in 1963 only 17% of the machines in domestic shoe factories were on lease from United. While approximately 90 per cent. of the machines shipped by United in the post-

[1]The Government appears to complain that the court's revenue figures excluded United's income from conversion sales (br. 12 n. 7). But if United had included conversion sales for the ten-year period, United's total revenue would have dropped even more—from $46,098,000 to $25,831,000—a 44% decrease (Ex. P-68, admitted Tr. 536).

decree decade have been on lease, a substantial number of these are ultimately bought by shoe factories. Most shoe factories initially lease rather than buy machines of the expensive types, not because the lease terms are not commercially related to sale terms, but because shoe-makers prefer to have the right easily to return expensive machines and because they lack either the financial ability or the inclination to invest substantial capital in shoe machinery. The continuation of the pattern of leasing expensive machines is a response to the demand from the shoe-making market which has 785 enterprises, many of them of modest resources. Without leases many of them could not continue in business. (Finding 6)

6. United is subject to constant full and free competition from competitors' machines in toe-lasting, side-lasting, sole-attaching, pulling over, and bottoming. That kind of competition reveals that several of the 18 sub-classifications of "major machines" are in competition with one another and that percentage calculations based upon each separate classification are misleading unless machines which are in competition with one another are grouped together, thus reflecting the true character of the shoe machinery market. (Finding 11)

7. In domestic shoe factories 187 different operations are employed for the manufacture of shoes, but in only 45 was United the sole source of supply. In almost all of those the total industry demand is less than six machines a year, the operation is not economically attractive, and the operation is competitive with other alternative operations for which machines are available from sources other than United. (Finding 15)

8. For the few sectors of the shoe machinery market in which United in 1963 was without significant competi-

tion, United's position in those sectors was not the result of any exclusionary power of United and did not make competition unworkable. (Finding 14)

9. Whatever dominance United continues to enjoy in sub-markets is due not to restraints of trade, but to normal economic forces including the merits of its products and the economic unattractiveness of the sub-market looked at alone. In some sectors of the market competition is already flourishing. In sectors where it is not flourishing all artificial barriers have disappeared. United has not created new barriers. United follows no practice and enjoys no significant advantage which could preclude or restrain competition by an enterprise of a size comparable with leading machinery companies in other industries. (Findings 15, 16)

10. The decree has tended to open the market by promoting the return of United machines by customers. The total returns to United of so-called major machines exceeded the total shipments by more than one-third during 1955-64. This trend promotes competition by making the shoe factory a more frequent customer for shoe machinery. (Finding 7)

11. In the decade 1953-63 shoe factories purchased over 53,000 machines which they had previously leased from United, such purchases continuing in reduced numbers to the very end of the period. Each purchase reduces United's power by making the machine available for the second-hand market. (Finding 8)

12. United has faced important competition from an active second-hand market, largely of its own machines. In 1963 that market sold about $3 million in machines, which stands comparison with United's revenues of $22 million from leases and $1.6 million from sales. The second-hand market is sufficiently vigorous so that it is not unusual now

for shoe factories to start in business utilizing many machines originally of United manufacture, without obtaining a single machine from United. (Finding 9)

13. The unanimous and representative testimony of shoe-makers is that there now exists in the shoe machinery market sufficient competition to allow the shoe manufacturers to select machinery as they wish on the merits of the machines available and in accordance with the processes they select to meet the various style changes in the consumers' market. (Finding 11)

14. In 1953 United had and exercised power to exclude competitors from every significant classification of shoe machinery. In contrast, by 1963 it was not exercising and was incapable of exercising exclusionary power over the entire market. This is shown not merely by its reduced share of the market, by its altered leases, and by the growth of competition from domestic manufacturers, importers, and second-hand machinery but by the following miscellaneous indicia. The seven older techniques of manufacture in which United once offered over 90% of the machine types, had by 1963 steadily declined to one-third of the relevant sub-market, and in the newer techniques United does not hold a commanding position. Hence United cannot control competition in those areas. Of the shoe machines in shoe factories, only 51% had been shipped by United and only 17% were covered by United leases. Of the shoe machines shipped in 1963 United's share by value may be as little as 48% and certainly is not much over 50%. (Findings 12, 13)

15. The shoe manufacturers' associations, representing substantially all the shoe manufacturers "who are among the chief intended beneficiaries of this Court's decree and who have had an unequalled opportunity daily to observe its effect in the last decade", are content with the operation

of the decree and do not want it modified (266 F. Supp. at 335, A. 83).

From its findings the court concluded that the decree "has operated in the manner and with the effect intended. It has put in motion forces which, aided by new technology, have eroded United's power and already dissipated much of the effect of United's monopolization." (*id.* at 334, A. 81). The court felt that the Government's complaint was not at any failure of the decree to work as expected, but at its failure *while working in the foreseeable and intended way* to accomplish the dissolution which the Government had originally prayed for and the court had rejected in 1953 (*id.* at 334, A. 82).

D. Economic Evidence.

The court's findings are not attacked by the Government as erroneous in any particular,[2] and it is therefore unnecessary to detail the abundant evidence which the court had for its decision. In view however of the Government's insistence that "monopoly power" still exists, we call attention to two classes of evidence showing the competition which has come into the market. The first is what Judge Wyzanski called "the unanimous and representative testimony of shoe makers"—uncontested by the Government—as to their freedom of choice and the supply of competitive machinery (266 F. Supp. at 332, A. 79), contained in a dozen affidavits[3] and in the testimony in open court of James H. Cheek, President of the Manufacturing Division of the important company Genesco Inc. and a member of the Technical Committee of the National Footwear Manu-

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[2]The Government does not claim that any finding is clearly erroneous, even though it quarrels with the interpretation of certain findings (pp. 26-8, 31-3) or the evaluation of some of the evidence (pp. 12 fn. 7, 15 fn. 11).

[3]Ex. D-24, D-25, D-26, D-29, D-31, D-32, D-33, D-35, D-36, D-38, D-39, D-41, D-43—all admitted Tr. 609.

facturers Association (Tr. 1352-1405). The second consisted in the testimony of Dr. Bertrand Fox, Professor of Business Administration and Director of Research of the Harvard Business School, whose extensive qualifications are set forth in Ex. D-86 admitted Tr. 1432, A. 36.

Professor Fox made an analysis of the dynamics of the shoe machinery industry in the ten-year period on the basis of an elaborate study of machine operations performed by United and competitive machinery. The Fox analysis focused on what he called "the single most significant requirement for effective or workable competition . . . the existence of realistic alternatives for buyers of a product so that they, by switching among sellers, can exercise pressure on each seller toward efficiency, price reductions, profits, improvements in products, improvements in processes" (A. 38). It is from that vantage point that he undertook his analysis of the industry. He did not approach the case by measuring industry-wide market shares, or the financial strength of competitors, or how many machines of each type they have marketed.[4] As pointed out in the footnote, the heterogeneity of the shoe machinery industry made those measures less satisfactory and less fruitful than the analytical method that he devised and used.

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[4]Indeed, when asked on cross-examination whether where there is one large company many times larger than any competitor, that would indicate that the company had market power, Dr. Fox emphatically stated: "That amount of information by itself for this business would not lead me inevitably to that finding or that result. This is a business, and I cannot emphasize this strongly enough, the way I look at it, that in essence almost consists of 187 different businesses, and the real competition of substituting one machine for another is in these cells one after another." (A. 70) And in response to a subsequent question by the court, Dr. Fox stated: "one cannot treat this as one market for a homogeneous product. This is not like an aluminum market or a wheat market. It is this difference, I think, which is extremely important for this particular industry, and it is also terribly difficult to get appropriate measures for it." (A. 70)

This method was to measure the market dynamics, the processes or direction of change, pursuant to the pretrial order, which speaks not of market shares or values but rather of "changes during the last decade in demands and requirements of the domestic shoe manufacturing industry for machines for shoe production; and changes in the number and types of United and non-United equipment available." At the threshold, he recognized the key characteristics of the shoe industry and the shoe machinery industry, summarized at pp. 3-4 above. He took account of the large number of operations required for shoe manufacture, the wide variety of shoes being produced, the number of different technologies employed, the small number of machines per operation in most shoe factories, and the shifts in types of shoes produced and technology employed (Tr. 1174-77, A. 44). There is an almost unlimited variety of ways by which entry is possible, in view of the very large number of separate shoe-making operations in which a machine can be offered (*ibid.*).

Against that background, the purposes of the economic studies were to ascertain the nature and extent of the alternatives available to manufacturers in the selection of shoe machinery, to identify the changes in such alternatives during the decade since the decree, and to assess the emerging patterns (A. 38).

Dr. Fox's evidence examined the flow of shoe production through each stage of manufacture, the alternative processes and sub-processes available at various stages, and the machines of United and competitive manufacture available for the 187 different operations. He devised standards to measure the economic attractiveness of the various operations. He examined the dates and volume of new entries into the market, both foreign and domestic, and analyzed the machine types produced by the 126 different suppliers.

On the basis of these studies he reached the following conclusions:

1. The realistic alternatives available to manufacturers in choosing shoe machines must be examined initially machine operation by machine operation (A. 44).

2. Since the decree, the number of competing offerings of non-United equipment has expanded to such an extent as to bring about a marked reduction in United's percentage share of total offerings (*ibid.*).

3. The response to the removal of artificial barriers to entry in the form of new offerings for particular machine operations, in the form of new companies domestic and foreign entering the industry, and in the form of older companies expanding the range of their offerings, has been prompt, vigorous and at a steadily increasing rate (A. 45).

4. Even though the bulk of United's large number of competitors offer machines for only one or two operations, nevertheless the nature of the industry and the continued existence of such companies attest to the viability of such competitors (*ibid.*).

5. The character of the shoe and shoe machinery industries and the magnitude of the demands for machines for a given operation are such that a large number of competitors per machine operation is not economically feasible (A. 44).

6. The differences in the patterns of number of competitors per machine operation are explained largely by the relative economic attractiveness of these various operations,

and are the expected patterns resulting from competitive forces not inhibited by artificial barriers (A. 45).

7. The new offerings of non-United equipment have been predominantly for the operations whose relative economic attractiveness has been high. United's competitors have tended to avoid the relatively unattractive operations in which United was already offering new machines and second-hand machines were available (*ibid.*).

8. The existence of alternative processes, sub-processes, and operations of shoe-making for any given operation reduces markedly the market power inherent in sole occupancy or occupancy by only a few suppliers of new machines for a particular operation (*ibid.*).

9. The development of a widespread second-hand market for United's machines has enlarged the number of alternative sources of machines open to shoe manufacturers, especially for those operations in which the number of suppliers of new machines is very small (*ibid.*).

10. The significant effect of the decree in altering the competitive situation in the shoe machinery industry and in enlarging substantially the alternative sources of machines open to shoe manufacturers is thus clearly evident (A. 45-46).

In detailing the evidence for these conclusions Dr. Fox noted the vigor of new entries into machine operations since the decree by competitive suppliers (A. 50-51, 55). He characterized as impressive the magnitude and increasing pace of new entries resulting from the decree's removal of artificial restrictions to entry (A. 52). Exhibit D-88 (admitted Tr. 1466) described the number of new entries

in each three-year period since the decree; viz. 24 to 34 to 59 for domestic machines, or for domestic and foreign machines combined from 43 to 56 to 90. The number of new companies which made new machine entries in each three-year period increased from 11 to 19 to 26, being a total of 56 new companies since the decree (Ex. D-88 Table 7). These new entries reflected a natural response to economic factors, as shown by the high proportion coming into operations which are relatively attractive to competition (A. 53). In Dr. Fox's opinion the pattern of new entries and the expansion of offerings of earlier entrants attest to the vigor of the response to the removal of artificial barriers to entry, and make clear the changed competitive environment of the industry today as compared to ten or fifteen years ago (A. 55). There are now alternative sources of machines for all but a few shoe-making operations and those are operations with the least incentive to competition and little demand, frequently because most shoes are being made by other operations (A. 61-62).

Dr. Fox testified that the relationships observed between relative market attractiveness and the number of shoe machinery competitors support the inference that artificial barriers are now absent and that realistic competition exists (A. 58, 60). Considering the alternatives available for a particular machine operation and also the alternative operations, sub-processes, and methods of shoe-making which increase the number of offerings from which shoe-makers can select machines, Dr. Fox concluded that "the concern for the possible market power inherent in being the sole supplier of new machines for an operation practically disappears" (A. 62). The demand for machines for most shoe-making operations is small. These operations could not possibly support a large number of suppliers. For about 78% of the various operations, the annual requirement (from all

sources) for machine shipments is less than 50 machines; and for about one-third of the operations, less than six new machines per year (A. 47). In one-half of United's models five machines or less are shipped annually (Ex. D-122, admitted Tr. 2154). The consequence is thus bound to be either a very small number of wide-line companies, or a sizable number of companies with narrow lines, or some combination of the two (A. 63). The effect of breaking United into parts might well be, in Dr. Fox's opinion, to drive other competitors out of the market (A. 70-71). He summarized by saying that his conclusions

> "show the significant effect of the provisions of the decree in altering the nature and extent of competition in the shoe machinery industry and in enlarging substantially the alternative sources of machines open to shoe manufacturers. And the nature of the trends which are evident suggest that the competition which United will face, in the future, will be stronger than at the end of 1964." (A. 66)

SUMMARY OF ARGUMENT

I

The relief provided by the 1953 decree, which was affirmed in 347 US 521 at the Government's request, identified all United's exclusionary practices which an exhaustive examination of the shoe machinery industry found to exist, and in addition to eliminating them added further measures to open up the market. The findings of the district court in reviewing the operation of the decree as of January 1 1965, which are not attacked by the Government, show the elimination of all restrictive practices, the freeing up of the market, and the entry of new competitors

and new machine offerings in increasing number. The influx of competition is illustrated by the massive reduction in United's leased machines outstanding, the doubling of revenues by United's principal competitors, the steadily diminishing shipment share of United, the displacement of older machine types by more recent innovations bringing in the techniques of competitors, the creation of a substantial second-hand market, the established freedom of choice of shoe manufacturers in the selection of machinery and alternative shoe-making processes. This situation reflects the steady dissipation of monopoly power, within the meaning of the statute and the decisions, and steady progress "in establishing workable competition" as the decree intended. The resultant situation is one of continuous movement in the shoe machinery as well as the shoe-making industry with a steady trend toward the reduction of United's market share.

The Government contends that a reduction of United's market share to 62% as of 1963 does not constitute sufficient progress in "establishing workable competition" and that more drastic relief is now required. The Government overlooks the continuing forces of change brought about by the decree, in ever-increasing measure. Furthermore the argument fixes on only one of the numerous ways to measure market share. A more illuminating measure is United's share of current new shoe machine business, as measured by the shipment of new machines from the plants of United and its competitors. United's share of total value from current shipments had declined to 48.6% of the total market by 1963. Of the machines entering the plants of shoe manufacturers in an 18-month period during 1963 and 1964, only 37% were purchased or leased directly from United, and only an additional 6.8% were United machines purchased or leased from others. 56.2% were machines of competitive

manufacture. These figures, all found by the trial court, measure United's current market share and its future trend more significantly than the 62% figure mentioned in the court's opinion—a figure that takes into account the revenues of United and its competitors from machines installed in shoe manufacturing plants many years before. Three-fourths of the shoe machines of United origin still in plants in United States shoe factories in 1963 had been shipped before 1955.

II

The district court's denial of the Government's petition for modification did not, as the Government contends, rest upon a misinterpretation and misapplication of the *Swift* doctrine. It is immaterial whether or not the district court correctly interpreted *Swift* as limiting its powers to grant further relief under the C-Day section of the decree in the case at bar. The predicate for further relief under the express terms of that section is a showing that over the ten-year period since it was entered the decree was not achieving its intended effect. In the case at bar, the district court's 16 findings fully support its conclusion that the 1953 decree has operated and is continuing to operate "in establishing workable competition" just as that decree intended. Accordingly, the predicate for further relief never came into existence. Unless the district court committed reversible error in concluding that the 1953 decree is operating as intended to create workable competition, the rule of *Swift* is not brought into question. Correct analysis of the district court's findings and conclusions discloses no reversible error on this issue.

Moreover, the district court correctly interpreted *Swift* to apply to litigated decrees as well as to consent decrees and

to modifications sought by the Government, as well as to modifications sought by defendants. The limitation of the *Swift* rule sought by the Government herein (to apply only to consent decrees and only to modifications sought by defendants) would constitute an unjust discrimination between the parties, would impair finality in litigation, and would unjustifiably burden this Court with reiterated appeals.

ARGUMENT

I. On the undisputed findings the adverse effects of monopolization have been removed and the decree is accomplishing its purpose in "establishing workable competition" by opening the market to the entry of competition on a scale continually increasing.

The remedies which the court in 1953 adopted as the alternative to dissolution were framed deliberately to create a second-hand market, purge the leases of restrictive features, and encourage competition by steadily weakening United's relationships with its customers (110 F. Supp. at 349-50). A sales alternative to the leases was created for the express purpose of dissipating United's monopoly power (*ibid.*). Upon United's appeal to this Court the Government, notwithstanding the denial of dissolution, sought and obtained approval by this Court of the decree so framed.

The question now before the Court is whether the trial judge properly decided that the several remedies contained in the decree were having their intended effect "in establishing workable competition" in the common-sense meaning of the words, viz. competition that works. We submit that those remedies were having and will continue to have that intended effect.

The monopoly power which the court found to exist in 1953 has now been dissipated. The careful findings of the district judge uniquely experienced from the 1953 proceeding in the nature and requirements of the shoe machinery industry, leave no room for doubt as to the effectiveness of the decree. These findings, 266 F. Supp. at 331-4, A. 76-81, are summarized at pp. 7-12 above.

The findings illuminate the factors of mobility and the new competitive forces which have been brought into play by the various decretal provisions. Continuing changes in shoe-making technology have displaced the older techniques employing the standard United types of machine. While in 1950 55% of sole-attaching was done by the seven older processes, this proportion had declined to 42% in 1955, and in 1963 to 33⅓%, which becomes 28% when the newly developed direct mold vulcanizing and injection molding processes are included[5] (Ex. D-13 admitted Tr. 1280-1, D-14 admitted Tr. 1278-9, D-14A admitted Tr. 1279-80). Testimony on the subject was given by James H. Cheek, Assistant Vice President of Genesco Inc., President of its Manufacturing Division, and a member of the Technical Committee of the National Footwear Manufacturers Association. He said that the original large volume welt production for women (both Goodyear and cement) was now practically extinct (Tr. 1378-9); that his company Genesco Inc. had stopped manufacture of shoes by the McKay process and the nail process (Tr. 1356-7); and that cement sole-attaching, direct mold vulcanizing and injection molding are replacing outsole laying, loose-nailing and slugging

[5]The district court found that the "market now includes machines for the manufacture of vulcanized rubber because such machines are competitive with injection moulding machines and other shoe machinery, are used in conventional shoe factories, and are used for both leather-upper and fabric-upper footwear." (266 F. Supp. at 331, A. 76)

operations, and the comparable operations of other processes (Tr. 1380-1). The same trend is attested by numerous other witnesses (e.g. Ex. D-24, D-25, D-30). The consequence has been to displace United machinery of the traditional types current in 1953.

Concrete illustration of the post-decree competitive forces in the shoe machinery field emerges from the record in a treble damage case brought by United's competitor International Shoe Machine Corporation in December 1956 on the basis of the decree. *International Shoe Machine Corp.* v. *United Shoe Machinery Corp.* 315 F. 2d 449 (CA 1 1963), cert. den. 375 US 820. Contrasting the shoe machinery field with which Judge Wyzanski dealt in the Government case, the First Circuit Court of Appeals said (315 F. 2d at 458):

> "In at least one significant facet, this was not the same 'context' which existed in the shoe machinery industry—and specifically in the specialized market of side and toe lasting machinery at issue here—during the instant limitations period. Two of plaintiff's [International Shoe Machine Corp.] three major pieces of equipment were commercially introduced into the market after the close of the evidence in the Government case. One of these machines apparently embodied a technological breakthrough which produced spectacular commercial success for plaintiff; with a demand which far outstripped supply and which strained plaintiff's productive capacity to the utmost. This machine was apparently a highly coveted item in many segments of the industry and its availability was a competitive factor which was missing from the 'context' of the side and toe lasting market in the Government case.

> . . . The machines which plaintiff introduced into the post-1951 market were assuredly pertinent factors in any assessment of the context of the competitive environment and structure within the relevant market for side and toe lasting machinery."

An analysis of United's machine inventory in the 18 major machine types with the new categories of direct mold vulcanizing and injection molding added, was received in evidence as Ex. D-127 (admitted Tr. 2265), and shows the movement of the 20 types from March 1 1955 to March 1 1965, with the numbers on lease, the total shipments in the period, the totals returned in the period, the net shipments resulting, and the total machine sales (used and new) in the period. This exhibit is summarized in three tables, made attachments to this brief, and classified by the types adopted before 1955 (Table A), the types adopted in or after 1955 (Table B), and a consolidated table for all types irrespective of the date of adoption (Table C).

The 54,329 United machines in the major categories which were on lease March 1 1955 had been reduced by March 1 1965 to 15,057 (including 42 machines of the new injection molding type). 31,750 machines had been sold. While 22,615 machines of the principal categories were shipped in the ten-year period, 30,137 in these same categories were returned by customers in the same period, so that the net returns of machines numbered 7,522, and the net diminution of machines outstanding on lease was 39,272.

These figures illustrate the district court's finding that "by 1963 United was not in fact exercising, and indeed was incapable of exercising, exclusionary power over the entire market" (266 F. Supp. at 333, A. 79). Free movement in the shipment, return, and alternating use of the various machine types had been established. The outstanding United machines of the 18 principal categories which were on lease in 1955 had been reduced in number by more

than two-thirds. Three-fifths of the originally leased machines in the major categories had been sold, thus removed from United's control, and established as potential competition to United's new production. Such was customers' freedom to return United machines that returns exceed shipments by one-third, these returns being accounted for in part by the new processes and machines superseding the old processes and machines. New machine types had entered the market in the form of the direct mold vulcanizing and injection molding machines.[6] The picture is thus one of great fluidity corresponding to the demonstrated freedom of choice enjoyed by shoe manufacturers.

The Government contention (br. 26) concerning United's "monopoly or near-monopoly position in the shoe machinery market" mistakenly rests on an asserted market position, recorded five years ago and called that which "United presently controls"—a kind of snapshot view which does not do justice to a moving picture.

The Government brief overlooks not only the movement introduced by the operation of the decree in the shoe machinery market, but the indefinite continuance of that movement in the process of erosion. This is an outstanding feature of the situation created by the decree. It is demonstrated not only by the excess of returns over shipments in each year of the ten-year period (Ex. D-133 admitted Tr. 2264) but also by the survey which United made of

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[6]As to injection molding, the Government distorts the record in asserting that United's sample (disclosing three machines) shows that it accounts for 100% of such machines used in this country (br. 11 n. 6). The Government's own exhibit shows that United's competitor Compo accounted for 68 shipments of such machines (Ex. P-26, admitted Tr. 83), in 1962-64 as against United's shipments of 28 machines (Ex. D-122, admitted Tr. 2154). Those figures highlight the impact of new competition on the market, for by the Government's own admission injection molding is "a new process of great commercial significance which substantially developed after entry of the original decree" (br. 11 n. 6).

shoe machines in place in 1963 and its updating to October 1 1964 (Ex. D-21 admitted Tr. 718, D-60 admitted Tr. 830). This survey was in the form of a random stratified sample, taken with expert statistical advice and accepted by the district court as being "clearly better" than those used in the original case (Tr. 636).

The first count embraced 11,854 machines, the updating took in 11,862 machines. Analysis of the sample by manufacturing origin of the machines in 47 representative factories showed that in the spring of 1963 only 15.3% of the machines counted were on lease from United, while in October 1964 this number had dropped to 13.4%. At the former date 31.2% in the sample had been purchased from United but were now owned by the factories, and at the latter date this percentage had fallen to 30.6%. In the spring of 1963 47.5% of the machines in place in the representative factories were made by competitors of United, while in October 1964 this percentage had increased to 49.7%. Separate analysis of the movement of machinery in the 47 sample factories during the 18 months' study shows that a far greater number of competitive machines entered those factories than United machines. Counted by source of manufacture, the figures are given in Stipulation No. 3 (par. 8, Tr. 823):

	Machines of USMC Manufacture	Machines Manufactured by Others	Total Shoe Machines
Machines Entering ..	270	346	616
Machines Leaving ...	256	67	323
Net Change	+ 14	+279	+293

When analyzed by source of acquisition, the same figures show that between the spring of 1963 and October 1964 37% of the machines taken on by the 47 sample factories were machines of United manufacture purchased or leased from United, 6.8% were machines of United manufacture

purchased or leased from others, and 56.2% were machines of competitive manufacture (Stipulation No. 3 par. 9, Tr. 832-3).

Under the carefully detailed provisions of the decree, with their impact unlimited in time, this process is bound to be a continuing one. It will operate for the indefinite future. The Government's description of the present market position, not only inaccurate in itself, also errs in calling it "an unsatisfactory result 10 years after an adjudication of monopolization" (Govt. br. 26). Any such description wholly overlooks the direction and permanence of the powerful forces set in motion by the decree.

Those trends are bound to continue: shares of current machine shipments are better than machine population figures as measures of current competitive success in placing machines in shoe factories. Because such share figures for United—whether measured in numbers of machines or values of machines—are well below population measures, population shares will inevitably decline further. Continuance of the decline is also assured by the trend and pace of new machine offerings and new entrants, the established second-hand market with more United machines available to second-hand dealers, the decrease in the importance of the older processes when confronted with newly-developed processes, and the fact that United is not now capable of exercising exclusionary power over the market.

The fallacy of the Government's position is demonstrable from several points of view. The Government apparently sees a need for further remedial measures even though it concedes United's present market share may not justify a new proceeding under the Sherman Act. The Government says (br. 26):

> "Whether United could presently be found to possess monopoly power or not in a new proceeding is inconsequential."

We submit on the contrary that it is of the greatest consequence on the question of terminating a proceeding now 20 years old, to realize that the continuing decline in United's market occupancy has already reached a share no longer subject to Sherman Act stricture, and is moving still lower.[7]

On the question of United's market occupancy as of 1963 the Government brief shows profound misunderstanding. This brief says the district court's "most significant finding" is that United "presently controls between three-fifths and two-thirds of the shoe machinery market and receives 62.2% of total industry revenues" (Govt. br. 26 citing 266 F. Supp. at 331). The Government asserts that these percentages indicate "the retention of substantial market power".[8] The fact of the matter is that the figure not only leaves out the continuing movement downward, but does not reflect current market power at all.

The 62% figure, while based on 1963 comparative revenues, took into account current lease income derived from

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[7]Even as of 1963, the undisputed findings reveal a market share for United which, however regarded, falls below the level set for criticism in *United States* v. *Aluminum Company* 148 F. 2d 416, 424 (CA 2 1945) and *United States* v. *Grinnell Corporation* 236 F. Supp. 244 (D. R. I. 1964), aff'd 384 US 563.

[8]While the Government has substantially accepted the findings below and in its brief of January 1968 (served in page proof) no reference is made to unit machine counts marked in evidence as Ex. P-52 and P-53, we note that the Government has designated these exhibits in the joint appendix. If utilized for the first time by the Government in a reply brief, we shall under Rule 41 have no opportunity to deal with them. We regard Ex. P-52 and P-53 as extremely misleading not only because bare machine counts are not significant in the present market (owing to the extreme age of many of them) but because the last four columns of the exhibits have been improperly edited through testimony offered by the witness Lionel Epstein. Without elaborating the point in this brief (since no argument has yet been made on these exhibits) we take the precaution of attaching as Appendix 2 pages 5-14 of our reply brief in the district court dated 20 March 1967.

past transactions. It was not limited to revenue *from 1963 shipments alone*. A vitally important index of market occupancy is the comparison of the values of current shipments of United and of its competitors in 1963, the latest year for which data were available at the time of the hearings. This comparison is not mentioned in the Government brief. Yet the record shows, on balancing the total sale value of United's 1963 shipments against the sale value of such competitors as had figures available (thus a distortion against United), that United's share was only 48.6% in 1963. The following tabulation summarizes the exhibits in evidence on that point:[9]

Sale value of shipments of	1963	Percentage
United	$13,683,660	48.6
Compo, ISMC and W. J. Young	7,137,754	
Other Competitors	7,319,690	51.4
	$28,141,104	100.0

This computation was based on the sale value of all shipments made by United, Compo, International Shoe Machine Corp. and W. J. Young. The value figure of $7,319,690 reflected the sales only of other competitors involved, and unavoidably omitted the sale value of lease shipments which were not susceptible of conversion into a comparable sale figure for 1963. The translation of the lease shipments

[9]Compo figures (Ex. P-36 [admitted Tr. 142], P-243 [admitted Tr. 477], D-107 [admitted Tr. 1848]); International Shoe Machine Corp. figures (Ex. D-103 [admitted Tr. 1810], D-105 [admitted Tr. 1822], P-158 [admitted Tr. 268-75, 351]); W. J. Young figures (Ex. D-111 [admitted Tr. 1931]); the figures for other competitors (Ex. P-69 [admitted Tr. 539], P-71 [admitted Tr. 546] and P-72 [admitted Tr. 551]).

of these competitors into a sale value figure would reduce United's percentage below 48.6%.

Attached to this brief as Table D is a compilation from the records of United, the records of competitors in so far as available, and the testimony of witnesses in open court, which compares shoe machinery revenues of 12 competitor companies and of United on an annual basis for the nine years 1955-63. (These 12 are only a portion of the non-United competitive forces [cf. Ex. P-69, A. 24; Ex. P-70, A. 26; Ex. P-71, A. 27; Ex. P-72, A. 28], being confined to companies with a reasonably good system of records whose representatives testified in open court.) While information from certain competitors in earlier years was sometimes lacking, the total picture is one of steady growth for those companies, both absolutely and by comparison with the decline of the United shoe machinery revenues.

Facts of this nature expose the fallacy of the Government's preoccupation with historical rather than current market share, for that obsession drives the Government into ignoring the central significance of Dr. Fox's testimony and the court's analysis: that competitive developments in the shoe machinery industry during the post-decree decade must be evaluated in the context of the market for shoe machinery. Salient features of that market are: it is a capital goods industry with a long-lived, durable product, whose demand is derived from the shoe industry; in the shoe industry the number of companies and the number of establishments have declined over the past ten years, and total shoe production has not kept pace with population; a relatively small number of the 187 machine operations would attract new competition under conditions of a wholly free market because so few machines are required to satisfy the entire demand for many of the operations; markets which are so limited do not exercise a strong attraction to new competi-

tive entry. Taking account of these and other characteristics, the erosion of population share figures in the post-decree decade is very great for this type of industry.

In stressing that each of United's competitors offers machines in relatively few operations (Govt. br. 27), the Government misses two vitally important points: *First,* a company does not need a broad line to compete effectively in one or a few machine operations, where the machine acquisition decisions are made. *Second,* because of the importance of technological developments and the attendant cost and time required in machine design to compete in any machine operation, the likelihood of many companies making more than a few such technological developments in a ten-year period is small. The apparent expectations of the Government in this respect are naive and unrealistic.

Moreover, the Government misapprehends the realities of the industry when it seeks to exploit the circumstance that in 45 of the machine operations United is the sole supplier (Govt. br. 28). The evidence clearly showed that there are now few shoe-making operations for which there are not at least some alternate sources of machines (A. 62), and these are operations with the least incentive to competition and little demand, frequently because shoes are being made by alternative operations (A. 61) as instanced below.[10] See the district court's Finding 15 set forth at p. 9 above.

The Government again misunderstands the realities in contending that the supply of United machines available for the second-hand market has been continually declining since 1955 (br. 27). The fact is that through sales and conversion sales the number of United machines owned by

[10]Exceptional cases are explained by circumstances such as the recent appearance of the operation, patent protection, market saturation, extremely complicated engineering and manufacture, or widely fluctuating demand (Tr. 1938-48, 1953-4, 1958, 1964, 1966, 1968-9).

customers is continually growing and therefore the competition from this expanding stock of machines for the second-hand market is bound to increase.

Furthermore all the elements of monopolization which the court on the most searching inquiry found to exist, have now been eliminated according to the uncontested findings after a careful review of experience under the decree. It remains true that United has not received monopoly profits (110 F. Supp. at 325); has been free from predatory practices (*id.* at 345); and has manifested the skill and efficiency which normally entitle an entrepreneur to prevail in competition (*id.* at 344; 266 F. Supp. at 334, A. 81).

That portion of the district court's decision which refers to the competition as among the 18 sub-classifications of major machines and suggests the interaction of shoe-making processes (Finding 11), was based upon a large amount of evidence as to the effect on the shoe machinery market of post-decree innovations in shoe technology. The various new processes relying on newer chemical operations that use cements for fastening of all types and various methods of molding, as described in the evidence of the shoe manufacturers (e.g. Ex. D-40 admitted Tr. 609), were depicted in charts of shoe production (Ex. D-54 admitted Tr. 1270) keyed to specific machine or hand operations described on the charts. The charts portrayed as of December 1964 the alternative flows of shoe production through each stage of manufacture, thus providing a picture of the multifarious functions in shoe-making and the divers choices open to the shoe manufacturer among the 187 operations (Fox A. 39). The testimony of Richard A. Unger illustrating the flow of manufacture demonstrated the various ways of lasting a flat-lasted shoe and the several choices open, step by step, between the conventional lasting methods and the autoclave method, or as to fastening the insole, again in assembling the shoe to the last, and so on through all the stages of manufacture. (The description of certain alter-

natives on the basis of two sample shoes as given by Mr. Unger at Tr. 1259-69, is reproduced in Appendix 1 to this brief, by way of illustration of the options that cause machine types to compete against each other.) This profusion of alternatives growing out of the new techniques and enhanced by the volatile demands of fashion, has brought into the market internal factors of competition which were scarcely present in the 1953 picture and which further reduce the importance of machine population counts.

In conjunction with the advent of new constructions utilizing simpler machine types of recent creation, is the fact that the number of machine types and models offered by United has steadily diminished. At the filing of its answer dated May 27 1948 to the Government's complaint, this number stood at 342. By March 1 1955 it had been reduced to 254 (Ex. D-15), 88 models having been withdrawn. By December 31 1963, 149 additional models of those actively offered March 1 1955 had been also withdrawn (Ex. D-15, D-17; O'Neil Tr. 963-4). The 115 types described by the district court (Finding 10, 266 F. Supp. at 332, A. 78), together with 24 types on application, include recent new offerings by United.

Finally, the Government's view of the evidence completely overlooks an important factor peculiar to this case, viz. the longevity of the United machines. The sample taken by United of machines in place in the 47 representative factories in 1963 shows that 75% of all the machines manufactured by United, whether or not owned by it in 1963, had been shipped before 1955 (Ex. D-16 admitted Tr. 1966). Thus three-quarters of the shoe machines which on a population basis the Government would include in its mechanical assessment of United's power in the 1963 market, were already in the market on the effective date of the 1953 decree. The great bulk of them left United ownership long ago, pursuant to the Plan for Terminating Form A Leases which paragraph 9 of that decree commanded (110 F. Supp.

at 353). The splitting of United's shoe machinery business into two or three parts would not affect the ownership by shoemakers of those machines, which are still working in the manufacture of shoes.

The doctrinaire character of the Government's attack is nowhere more obvious than in the claim (br. 28) that the competitive situation in the shoe machinery industry "is in many ways similar to the liquid bleach industry" involved in *Federal Trade Commission* v. *Procter & Gamble Co.* 386 US 568, 571. From any realistic standpoint, the characteristics of the two industries are poles apart. In contrast to the highly diversified nature of the shoe industry, with its 187 different operations and the wide variety of alternatives available to sophisticated industrial buyers purchasing for their particular needs, the liquid bleach industry sells a chemically identical, low-cost, high-turnover consumer product (386 US at 571). Advertising and an efficient distribution system are vital competitive weapons in successful consumer marketing; the increased advertising and distribution advantages to Clorox from its union with Procter & Gamble gave a significant competitive edge to the Clorox product and raised barriers to new entry. Advertising and a distribution system are irrelevant in the shoe machinery industry. The progressive lowering of barriers in the case at bar is proven beyond doubt by the steadily increasing numbers of post-decree competitors, new entrants into the industry, and new machine offerings (p. 17 above). The suggestion that the two industries are "in many ways similar" affronts the realities of a heterogeneous machinery industry as compared with a homogeneous light consumer industry. It also ignores the competitive dynamics of the shoe machinery industry set in motion by the court's decree.[11]

[11] A similar attempt to analogize *Clorox* was recently rejected in *Butler Aviation Co.* v. *CAB*, 1968 Trade Cas. ¶ 72,354 (CA 2 January 31 1968). There the court observed that unlike the "identical liquid bleaches" in *Clorox*, the machines in the case at hand (executive jet planes) vary substantially in characteristics and price—variations also present in shoe machines.

Equally weak is the Government's claim that barriers to new entry into the shoe machinery industry continue to be great, and that most of the barriers present in 1953 are still present to a significant degree (Govt. br. 29-30). The claim conflicts with the plain findings that by 1963 United was incapable of exercising exclusionary power over the entire market; that the unattractive rates of return in some shoe machinery lines tend to discourage full-line entries; and that whatever advantages United enjoys are not due to restraints of trade (266 F. Supp. at 333-34, A. 81). Equally important, the primary barriers to competition found in 1953 were United's size, know-how, patents,[12] servicing network, and leasing system—as the Government concedes (br. 4). Of these, the only possible remnants are size and know-how. But size is no longer a barrier, as the above-mentioned findings of the district court make clear. Nor is know-how; indeed, this fanciful view of know-how as an artificial barrier is merely a way of saying that superior skill, foresight and industry (cf. 148 F. 2d at 430) are now to be considered a detriment to competition.

The Government disagrees with these conclusions. But the conclusions are essentially conclusions of fact based on testimony of record. They were reached by a judge with unique experience both in factual knowledge and economic analysis of the shoe machinery industry. Only the most grievous error in reading the evidence or analyzing its economic significance would justify the substitution of this Court's factual and economic conclusions for those of the judge who has studied the industry so intensively over the past twenty years.

[12]No facts were presented showing exclusion of competition through new patents, despite the Government's unsupported implication to the contrary (br. 51). In its 1953 opinion, the court noted that most of the patents on the fundamental inventions had expired and most existing patents did not technically prevent the accomplishment of the same result in another way. (110 F. Supp. at 333)

The Government urges that under the C-Day provision the test for further relief is whether by 1963 the decree *had succeeded* in establishing workable competition—not, as the trial judge concluded, whether by 1963 the decree had moved at a satisfactory rate "*toward establishing*" workable competition.

As we have shown, the difference is a small and largely academic one, since the trial judge found that by 1963 workable competition had in fact been established in the major shoe machinery lines, that United lacked exclusionary power to prevent workable competition in the remaining minor lines, and that competitive choices were available in other lines which buyers could freely substitute for these minor sole source lines. But in any event, the trial court's reading of its own decree language is plainly a reasonable one; it gives full effect to every word in the disputed clause; it leaves ample room for further relief if the degree of progress had been found inadequate or its rate too slow; and so construed, it is an effective form of relief well within the discretion of a trial court in a monopolization case. Despite the Government's protestations to the contrary, any lawyer reading this clause when the decree issued would realize that it was open to the interpretation now placed upon it. Yet the Government was content with the decree when it was issued in 1953. The Solicitor General vigorously defended it against United's appeal to this Court and elected not to cross-appeal. His present attack can hardly be squared with his predecessor's 1953 praise for "the logic, the clarity and the meticulousness of the opinion on remedy, and of the decree itself."

The cases cited by the Government (br. 21-24) for the proposition that a decree following a finding of monopolization must direct the immediate restoration of competition, by drastic structural means if necessary, dealt with factual sit-

uations widely different from that under review. Those cases uniformly involved deliberate acquisition and extension of monopoly power by combinations of competitors and restraints of trade; Judge Wyzanski, by contrast, found that United's conduct had been "honestly industrial", 110 F. Supp. at 344, and that "it would be anomalous to charge the officers of United with any moral deficiency". 110 F. Supp. at 348. Moreover, the cases cited by the Government which decreed divestiture were cases in which the businesses divested were acquired as part of a program of monopolization, e.g. *United States* v. *Grinnell Corp.* 384 US 563, or in which divestiture was necessary to break affiliations which facilitated conspiracies in restraint of trade. E.g. *International Boxing Club of New York, Inc.* v. *United States* 358 US 242, 255-59; see also *United States* v. *Crescent Amusement Co.* 323 US 173, 188-90. Where neither of these obvious justifications for divestiture is present, as is the case here, divestiture is not presumptively appropriate. In so ruling in 1953, Judge Wyzanski was following the admonition of this Court in another such case, *United States* v. *National Lead Co.* 332 US 319, 353:

> "To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such a separation would amount to an abuse of discretion."[13]

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[13]The only somewhat similar situation, comparable although less favorable on its facts to the defendant concerned, came before this Court in *United States* v. *International Harvester Co.* 274 US 693 (1927). This also was an attempt to modify an existing decree and obtain dissolution of the company, which had been held upon trial to have a more than 85% market share, 214 Fed. 987. On the petition for further relief, a reduction of market share was shown, and this Court found competitive conditions had been established (274 US at 704, 709). Dismissal of the Government's petition for modification was affirmed. The case at bar as represented by the

In this context it is of interest that John M. Clark, originator of the phrase "workable competition", has now re-set it in terms that he calls dynamic tools of analysis. See "Competition as a Dynamic Process", Brookings Institution 1961 (Preface p. ix)[14]. The analytical features of this study bear comparison with the evidence of Professor Fox in this record and with the conclusions of the district court.

In his new book Professor Clark expressly shifts the emphasis from "workable" to "effective" competition because, as he says (Preface p. ix):

> ". . . 'workable' stresses mere feasibility and is consistent with the verdict that feasible forms of competition, while tolerable, are still inferior substitutes for that 'pure and perfect' competition which has been so widely accepted as a normative ideal. And I have become increasingly impressed that the kind of competition we have, with all of its defects—and these are serious—is better than the 'pure and perfect' norm, because it makes for progress. Some departures from 'pure and perfect' competition are not only inseparable from progress, but necessary to it. *The theory of effective competition is dynamic theory.*" (Emphasis supplied)

Clark's new work is devoted to a consideration of the dynamic elements in competition as to which he says (p. x):

> "Of the essence of the picture are innovations and their diffusion, and competition in products and sales promotion, as well as in prices."

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findings of the district court shows a much sharper, more definite, and continuing reduction of market share together with the entry of new competitive forces.

[14]The advisory committee assembled by The Brookings Institution for Mr. Clark's study consisted of the well-known economists Corwin D. Edwards, Richard B. Heflebower, A. D. H. Kaplan, and Mark S. Massel (p. vii).

In his concluding appraisal he summarizes the elements of effective (workable) competition as follows (p. 487):

> "As to the forces tending to the maintenance of effective competition, the outstanding ones include, first, the freedom of any individual, by himself or by forming an organization, to engage in any trade or industry; second, access to the necessary means of production, including funds, material resources, and technical knowledge; and third, a climate in which participants in an industry can and do maintain independence of attitude and policy, and in which there are enough independent firms to afford opportunities of substantial increase in the market share of any who compete successfully, and enough to create an inherent probability that there will be some among them whose situation and temperament lead them to initiate competitive action, thus breaking up any tendency for the market to settle into a passive condition of mutual defensiveness."

We submit that this is a fair theoretical description of the elements of movement, change over time, ease of entry, and competitive endeavor which are exemplified in the present record. It points up the dynamics of effective (workable) competition—the market dynamics which Dr. Fox has so carefully considered in terms of this record and against the background of the trial court's original findings (pp. 13-8 above).

II. The trial court did not apply an erroneous standard in refusing to modify its decree.

On the findings and evidence summarized above, we submit it is clear that the further remedies sought by the Government were rightly refused. If so, neither the inter-

pretation of par. 18's provision for possible re-examination of the decree nor the application of the rule of *United States* v. *Swift & Co.* 286 US 106, 119 that an injunction

> "is not subject to impeachment in its application to the conditions that existed at its making"

is drawn into question. While Judge Wyzanski concluded that his power to alter the decree was limited by the *Swift* rule and was not broadened by par. 18 (266 F. Supp. at 329-30, A. 73-74), any error in this conclusion would be immaterial, if error there were, by reason of the correctness of his basic holding that the decree is having its intended effect in establishing workable competition, and that the predicate for further relief under par. 18 had not been established.

In principle however we submit that the Government's effort to escape from the *Swift* rule or to construe par. 18 as modifying it is not entitled to succeed.

A. Paragraph 18 did not contemplate resort to drastic structural relief if the decree was working as intended.

The Government argues that the "plain meaning" of par. 18 (br. 42) was that if upon re-examination the decree had not fully restored "workable competition" it was to be recast with "a presumption in favor of remedies designed to change the structure of the industry—i.e., some form of divestiture" (br. 48). On the contrary, as its author Judge Wyzanski held, it is clear that par. 18 did not contemplate that the decree was to be altered if it was working as anticipated. It is especially clear that in these circumstances it did not contemplate drastic structural relief.

Judge Wyzanski in his original Opinion on Remedy after careful consideration rejected the Government's demand that United be dissolved into three manufacturing

companies, 110 F. Supp. at 348, despite the Government's contention that injunctive relief would leave "the basic monopoly of United . . . untouched and unimpaired." Brief for the United States on Relief, p. 37. Judge Wyzanski did not state that he was withholding dissolution "until milder remedies have been tried," as he did when discussing the possibility of prohibiting leasing altogether, 110 F. Supp. at 349, or as he did when leaving United flexibility in setting the comparative terms of lease and sale, *id.* at 351. He rejected dissolution outright.[15] The Government neither argued to Judge Wyzanski that if he refused dissolution he should leave the possibility open for the future nor intimated to this Court that he had done so. If the Government had suggested to this Court that Judge Wyzanski's rejection of dissolution was merely tentative, not only would the decree have been non-appealable, *Brown Shoe Co., Inc.* v. *United States* 370 US 294, 306-11, but far graver questions of the sufficiency of the evidence to support the decree would have been presented.

Where the Government has wished in antitrust decrees to provide that the advisability of divestiture should be re-examined *de novo* at some future time, it has known how to say so in terms which left no doubt. E.g., *United States v. International Harvester Co.* 274 US 693, 697; Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?*, 68 Yale L. J. 1391, 1396 n. 22 (1959). It never sought to have par. 18 say so; and it should not be permitted now to override the consistent understanding of the parties and the judge who framed par. 18 that it did not say so. Cf. *United States* v. *Atlantic Ref. Co.* 360 US 19.

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[15]The Government at br. 24-25 gives an erroneous impression that the mention of "milder remedies" was directed to the possibility of dissolution; this is incorrect.

B. The decree may not be modified in the absence of material and unforeseen changes in the conditions that existed when it was drawn.

The Government contends that the structural relief it seeks "could have been imposed in the original decree" (br. 40), so that "neither *Swift* nor any other precedent requires the restrictive approach to modification of antitrust decrees adopted by the district court" (br. 41). In fact, the Government sought dissolution at the original trial, arguing then as now that injunctive relief alone is inadequate, and the district court rejected dissolution as impracticable and unnecessary. This case is therefore governed by the standard enunciated by this Court in *United States* v. *Swift & Co.* 286 US 106, 119:

> "We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting."

This Court has often re-affirmed the *Swift* standard. In *System Fed'n No. 91, Ry. Employes' Dep't* v. *Wright* 364 US 642, 647-48, for example, this Court held:

> "There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree *if the circumstances,* whether of law or fact, obtaining at the time of its issuance *have changed, or new ones have since arisen. . . .* A balance must thus be struck between the policies of *res judicata* and the right of the court to apply modified measures to *changed circumstances.*" (Emphasis supplied.)

See also *Dombrowski* v. *Pfister* 380 US 479, 492; *Los Angeles Meat & Provision Drivers Union* v. *United States* 371 US 94, 103 & n. 7; *Donaldson* v. *Read Magazine, Inc.* 333 US 178, 184. The *Swift* standard has consistently been applied by lower Federal courts.[16]

The *Swift* standard is supported by the weighty considerations that underlie *res judicata:* re-litigation of an adjudication upon which the prevailing and third parties have relied is both wasteful and unjust. *System Fed'n No. 91, Ry. Employes' Dep't* v. *Wright* 364 US at 647-8. Relitigation of the issue whether United should be dismembered would be especially unjust after the passage of fifteen years during which United has continued to invest capital and energy in the shoe machinery field in reliance upon Judge Wyzanski's refusal to dissolve it. Even commentators who urge that the *Swift* rule should generally be relaxed recognize that it should be followed where there has been such reliance. See e.g. Note, *Requests by the Government for Modification of Consent Decrees,* 75 Yale L. J. 657, 670 (1966).

Perhaps recognizing this, the Government calls Judge Wyzanski's decree "tentative" and "provisional" (br. 38), and asserts that allowing re-examination *de novo* of the issue of dissolution in cases like this one would "permit a desirable degree of flexibility . . . as to the nature and scope of relief sought initially" (br. 44), even in the absence of material and unforeseen changes in circumstances. But the Government sought no such alternative in this case. Relying upon the sweeping rule later authoritatively formu-

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[16] E.g., *Food Center, Inc.* v. *Food Fair Stores, Inc.* 356 F. 2d 775, 779-80 (CA 1 1966); *Schildhaus* v. *Moe* 335 F. 2d 529 (CA 2 1964) (Friendly, J.); *Bowdil Co.* v. *Central Mine Equip. Co.* 216 F. 2d 156, 159 (CA 8 1954), cert. denied 348 US 936; *Morse-Starrett Prods. Co.* v. *Steccone* 205 F. 2d 244, 248-49 (CA 9 1953); 7 Moore, *Federal Practice* ¶ 60.26[4], at 288 (2d ed. 1966).

lated in *du Pont,* 366 US at 327-31, it pressed for immediate dissolution of United, failed to establish that it was either possible or desirable, and failed to appeal. It should not now be permitted to re-litigate that issue by rewriting the record.[17]

The Government also suggests that *Swift* has been overruled, at least as to petitions for modification by the Government, by *Chrysler Corp.* v. *United States* 316 US 556 and *Hughes* v. *United States* 342 US 353. *Chrysler* holds merely that a decree may be modified in an incidental particular when the party opposing modification can point to no way in which it will be injured by modification. 316 US at 563-64; see Note, *Modification of Antitrust Consent Decrees,* 63 Harv. L. Rev. 320, 325 (1949). Contrast *Ford Motor Co.* v. *United States* 335 US 303, 321-22, where prejudice was clear. United would sustain substantial injury if modification were permitted here. *Hughes* holds only that no modification may be made without a hearing; while the Government argued in that case that *Chrysler* had relaxed the *Swift* standard and excused the failure to hold a hearing, Brief for the United States, pp. 22-29, this Court did not even mention this argument in its opinion. Lower Federal courts have consistently applied the *Swift* standard to motions by the Government for modification. *United States* v. *Radio Corp. of America* 46 F. Supp. 654 (D. Del. 1942), appeal dismissed on motion of United States, 318 US 796; see *United States* v. *Imperial Chem. Indus., Ltd.* 1957 Trade Cas. ¶ 68,859 (SDNY 1957).

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[17]Nor can the Government rely on cases in which provisions of the decree were appealed, and this Court indicated that the points on appeal might be raised again below if circumstances proved the appealing party's apprehensions justified. E.g., *Lorain Journal Co.* v. *United States* 342 US 143, 156-57; *Associated Press* v. *United States* 326 US 1, 22-23.

In essence, the Government is seeking to avoid the application of the *Swift* rule on the ground that it *is* the Government. This approach is particularly inappropriate in a litigated case. It is also a surprising argument in the context of the power of a court of equity to modify its decrees. "For such a court to ignore totally the interests and concerns of a private defendant in favor of the Government would be wholly inconsistent with the spirit of the principles upon which its authority is founded." Note, 75 Yale L. J. 657, 669 n. 60 (1966). The Government here is asking that at its instance only a judicial decree, contrary to the general rule, be made "freely susceptible to unilateral change." See Note, 63 Harv. L. Rev. 320, 322 (1949).

No precedent and no policy support such a radical departure from established principles of jurisprudence. The only case cited by the Government for its unusual proposition, *Virginian Railway Co.* v. *System Fed'n No. 40* 300 US 515, 552, had nothing to do either with modification of a decree or with preferential treatment of one party over another. The Court was there declaring the proposition that a court of equity in framing an original decree in a private dispute should have regard for an applicable statutory "declaration of public interest and policy which should be persuasive" in the court's consideration. *Ibid.* All antitrust decrees granting relief are designed to protect the public interest. There is no more public interest to be served by wasteful re-litigaton of settled matters than there is by employing divestiture where antitrust violations can be corrected by less drastic remedies.

The Government also intimates that *Swift* should not apply because the decree in this case was entered after litigation, not upon consent. But the decree in *Swift* was entered "after years of litigation", 286 US at 119, and the Court rejected the contention that the standard of modification

for consent decrees should differ from that for litigated decrees. 286 US at 115. See also *System Fed'n No. 91, Ry. Employes' Dep't* v. *Wright* 364 US 642, 650-51. The *Swift* rule has consistently been applied to litigated antitrust decrees. E.g., *Adelman* v. *Paramount Pictures, Inc.* 296 F. 2d 308 (CA 5 1961), cert. denied 369 US 851; *United States* v. *Besser Mfg. Co.* 125 F. Supp. 710 (E. D. Mich. 1954). If any distinction is to be made between litigated cases and consent decree cases with regard to the standards applicable to a subsequent petition for modification, a greater showing of need for a change should be required for decrees entered, like the present one, after litigation. Such decrees are normally the result of a much larger investment of money and time by both sides, and of available judicial resources both at trial and on any appeal. Litigated decrees are based upon far greater knowledge of and far sharper focus on the facts regarding not only the antitrust violations but also the industry context in which they take place. Cf. *United States* v. *United States Gypsum Co.* 340 US 76, 87-88. A litigated decree represents an independent and informed evaluation that consent decrees rarely reflect. Because decrees entered after litigation involve far more judicial involvement in the process of producing and reviewing a decree, there should be greater reluctance to interfere with a framework once it is fixed and defined.

The Government's attack on *Swift,* if accepted, would threaten the finality of every antitrust decree to which the Government is a party. Notwithstanding the disavowal (br. 40-41), it would entail precisely that continuing judicial supervision of business conduct which this Court deprecated in *United States* v. *Paramount Pictures, Inc.* 334 US 131, 162-64. It would leave forever pending over each antitrust defendant, whether successful or not in the original ad-

judication, the Damocles sword of renewed litigation, and would impose upon this Court the repeated burden of successive appeals under the Expediting Act. No case would ever be ended.

Looked at in the light in which the Government brief attempts to change the *Swift* rule, that is, in the light of proper practice in antitrust enforcement, the question arises, To what end should such a change be made? The case at bar was filed in 1947, and the Court may well ask what purpose is served by its indefinite prolongation. If a current antitrust violation is claimed to exist, the courts stand open for a new action, however unwarranted it may prove to be upon examination.[18] If on the other hand the facts of recent occurrence do not warrant and would not support an independent suit, as is hinted at Govt. br. 26, how can it possibly be in the public interest to keep litigation alive by adding a *coda* to a litigation already twenty years old?

The fact that, as Judge Wyzanski clearly pointed out, the scope of his ten-year review was foreseen from the beginning and the subsequent development of the industry under the channeling of his decree has fallen into the anticipated pattern, makes all the more inappropriate the present attempt to revive the original prayer for dissolution which lapsed with the expiration of the Government's right of appeal in 1953. As the district court pointed out, the Government's complaint is "not that the decree did not work as expected, but that working in the foreseeable and intended

[18]For the most part, the commentators who urge that the *Swift* rule should be modified would do so when the Government seeks to *litigate the merits* of a case. See, e.g., Turner, *Antitrust Consent Decrees: Some Basic Policy Questions*, 23 N. Y. City Bar Ass'n Record 118, 126 (1968); Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 Harv. L. Rev. 1303, 1324-27 (1967). The reference by Government counsel at Tr. 36 to an increase in price in April 1966, outside the review period, does not justify the reference at Govt. br. 31 n. 14 to "new or continuing restraints of trade".

way the decree did not accomplish what the Government had originally prayed for and what this Court had rejected" (266 F. Supp. at 334, A. 82).

It deserves special emphasis that this is a *continuing* decree, and that the court retains jurisdiction to consider future requests for modification. We do not say that circumstances could not arise in which the Government might be entitled to further relief including divestiture; neither does *Swift*. We urge only, as *Swift* and *Alcoa*, 153 F. Supp. 132, 166 (SDNY 1957) hold, that whenever the Government seeks such relief, it should carry the burden of showing changed conditions that establish the inability of the decree as originally fashioned to accomplish its intended purpose. This is the burden the Government has failed to sustain.

CONCLUSION

The district court's order and decision of April 11 1967 are, in so far as appealed from, the only proper resolution of this long-enduring litigation, and should be affirmed.

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March 11 1968

TABLE A

UNITED'S "MAJOR" MACHINES ADOPTED PRIOR TO 1/1/55

		Machs. on Lease 3/1/55	Machs. Shipped 3/1/55-3/1/65	Machs. Returned 3/1/55-3/1/65	Net Shipments 3/1/55-3/1/65	Total Mach. Sales	Machs. on Lease 3/1/65
1	Clicking	22,553	2,238	5,170	(2,932)	17,459	2,162
2	Eyeletting	2,441	574	673	(99)	1,867	475
3	Cutting Press Dinking	219	61	74	(13)	182	24
4	Pulling Over	2,885	658	1,736	(1,078)	1,248	559
5	Lasting:						
	Side Lasting—Flat	2,244	628	1,847	(1,219)	800	225
	Side Lasting—Welt	1,419	209	603	(394)	801	224
	Stitchdown Lasting	688	197	492	(295)	323	70
	Prewelt Lasting	74	8	50	(42)	8	24
	Toe Lasting—Flat	2,601	999	2,633	(1,634)	823	144
	Toe Lasting—Welt	1,898	286	1,413	(1,127)	594	177
	Heel Seat Lasting	1,563	905	1,000	(95)	666	802
	All	10,487	3,232	8,038	(4,806)	4,015	1,666
6	Welt Sewing	1,210	117	971	(854)	234	122
7	Inseam Trimming	531	103	288	(185)	214	132
8	Outsole Laying	1,092	253	1,061	(808)	117	167
9	Rough Rounding	1,351	321	947	(626)	502	223
10	Stitch Outsoles	4,238	1,166	2,918	(1,752)	1,605	881
11	Cement Sole Attaching	675	594	928	(334)	80	261
12	Littleway Lockstitch Sole Sewing	744	135	643	(508)	190	46
13	McKay Chainstitch Sole Sewing	302	44	224	(180)	108	14
14	Loose Nailing	1,051	135	504	(369)	551	131
15	Outsole Leveling	662	57	466	(409)	212	41
16	Fibre Fastening	441	117	253	(136)	214	91
17	Heel Attaching	2,739	679	1,970	(1,291)	1,001	447
18	Slugging	701	60	329	(269)	385	47
11-A	Direct Molded Vulcanized	—	—	—	—	—	—
11-B	Injection Molding	—	—	—	—	—	—
	Total	54,322	10,544	27,193	(16,649)	30,184	7,489
	Number of Conversion Sales					29,613	
	" " New Machine Sales					571	

TABLE B

UNITED'S "MAJOR" MACHINES ADOPTED 1/1/55 OR LATER

		Machs. on Lease 3/1/55	Machs. Shipped 3/1/55-3/1/65	Machs. Returned 3/1/55-3/1/65	Net Shipments 3/1/55-3/1/65	Total Mach. Sales	Machs. on Lease 3/1/65
1	Clicking	5	4,199	518	3,681	1,085	2,601
2	Eyeletting	—	—	—	—	—	—
3	Cutting Press Dinking	—	—	—	—	—	—
4	Pulling Over	(5)	1,271	300	971	68	898
5	Lasting:						
	Side Lasting—Flat	(1)	1,690	548	1,142	203	938
	Side Lasting—Welt	—	—	—	—	—	—
	Stitchdown Lasting	—	—	—	—	—	—
	Prewelt Lasting	—	—	—	—	—	—
	Toe Lasting—Flat	14	1,945	959	986	13	987
	Toe Lasting—Welt	9	480	54	426	11	424
	Heel Seat Lasting	(2)	161	19	142	19	121
	All	20	4,276	1,580	2,696	246	2,470
6	Welt Sewing	2	521	65	456	39	419
7	Inseam Trimming	—	—	—	—	—	—
8	Outsole Laying	—	—	—	—	—	—
9	Rough Rounding	1	135	20	115	2	114
10	Stitch Outsoles	—	—	—	—	—	—
11	Cement Sole Attaching	(16)	747	305	442	36	390
12	Littleway Lockstitch Sole Sewing	1	448	100	348	29	320
13	McKay Chainstitch Sole Sewing	—	—	—	—	—	—
14	Loose Nailing	—	—	—	—	—	—
15	Outsole Leveling	0	183	26	157	30	127
16	Fibre Fastening	—	—	—	—	—	—
17	Heel Attaching	0	231	13	218	31	187
18	Slugging	—	—	—	—	—	—
11-A	Direct Molded Vulcanized	0	9	9	0	0	0
11-B	Injection Molding	(1)	51	8	43	0	42
	Total	7	12,071	2,944	9,127	1,566	7,568
	Number of Conversion Sales					306	
	" " New Machine Sales					1,260	

Note: The negative figures in the 3/1/55 column are due to the necessity of working backwards from 1964 through various adjustments with three machine records so as to establish a consistent basis for machine activity (Snow Tr. 2288-91).

TABLE C

ALL UNITED'S "MAJOR" MACHINES

		Machs. on Lease 3/1/55	Machs. Shipped 3/1/55-3/1/65	Machs. Returned 3/1/55-3/1/65	Net Shipments 3/1/55-3/1/65	Total Mach. Sales	Machs. on Lease 3/1/65
1	Clicking	22,558	6,437	5,688	740	18,544	4,763
2	Eyeletting	2,441	574	673	(99)	1,867	475
3	Cutting Press Dinking	219	61	74	(13)	182	24
4	Pulling Over	2,880	1,929	2,036	(107)	1,316	1,457
5	Lasting:						
	Side Lasting—Flat	2,243	2,318	2,395	(77)	1,003	1,163
	Side Lasting—Welt	1,419	209	603	(394)	801	224
	Stitchdown Lasting	688	197	492	(295)	323	70
	Prewelt Lasting	74	8	50	(42)	8	24
	Toe Lasting—Flat	2,615	2,944	3,592	(648)	836	1,131
	Toe Lasting—Welt	1,907	766	1,467	(701)	605	601
	Heel Seat Lasting	1,561	1,066	1,019	47	685	923
	All	10,507	7,508	9,618	(2,110)	4,261	4,136
6	Welt Sewing	1,212	638	1,036	(398)	273	541
7	Inseam Trimming	531	103	288	(185)	214	132
8	Outsole Laying	1,092	253	1,061	(808)	117	167
9	Rough Rounding	1,352	456	967	(511)	504	337
10	Stitch Outsoles	4,238	1,166	2,918	(1,752)	1,605	881
11	Cement Sole Attaching	659	1,341	1,233	108	116	651
12	Littleway Lockstitch Sole Sewing	745	583	743	(160)	219	366
13	McKay Chainstitch Sole Sewing	302	44	224	(180)	108	14
14	Loose Nailing	1,051	135	504	(369)	551	131
15	Outsole Leveling	662	240	492	(252)	242	168
16	Fibre Fastening	441	117	253	(136)	214	91
17	Heel Attaching	2,739	910	1,983	(1,073)	1,032	634
18	Slugging	701	60	329	(269)	385	47
11-A	Direct Molded Vulcanized	0	9	9	0	0	0
11-B	Injection Molding	(1)	51	8	43	0	42
	Total	54,329	22,615	30,137	(7,522)	31,750	15,057
	Number of Conversion Sales					29,919	
	" " New Machine Sales					1,831	

Note: The negative figure in the 3/1/55 column is due to the necessity of working backwards from 1964 through various adjustments with three machine records so as to establish a consistent basis for machine activity (Snow Tr. 2288-91).

TABLE D (Referred to at p. 30 above.)

	1955	1956	1957	1958	1959	1960	1961	1962	1963
COMPANY									
1. INTERNATIONAL SHOE									
Lease	$ 982,991	$ 1,175,889	$ 1,460,234	$ 1,738,968	$ 1,918,753	$ 2,382,990	$ 2,954,188	$ 3,294,608	$ 3,609,087
2. COMPO									
Lease	1,406,719	1,437,465	1,448,245	1,381,603	1,406,952	1,428,065	1,578,442	1,577,534	1,563,566
Sale	313,223	363,343	172,315	362,858	381,625	298,744	402,202	1,200,167	1,435,544
3. INDUSTRIAL SHOE									
Sale	(No information in Record)				74,500	154,000	360,000	243,000	189,000
4. SAGEM CORP.									
Sale	43,496	24,400	24,920	48,880	39,040	43,920	39,040	14,640	14,640
5. SCHWABE									
Sale and Lease	392,565	394,477	425,762	438,453	658,755	586,442	591,848	855,804	763,217
6. W. J. YOUNG									
Lease	0	0	0	0	3,720	5,580	9,300	31,620	47,430
Sale	73,225	133,750	62,000	52,725	134,045	208,915	286,575	196,425	181,250
7. LUDLOW ENTERPRISES									
Lease			0	0	0	0	0	0	800
Sale			29,574	107,036	49,484	103,158	170,922	179,091	245,195
8. DIAMOND MACHINE									
Lease	(No information in Record)								
Sale							23,067	45,492	75,493
9. BOSTON MACHINE WORKS									
Lease	135,453	147,375	154,582	185,169	208,155	230,782	252,914	286,867	296,906
Sale	111,578	116,185	138,404	136,981	141,331	146,558	137,488	139,088	151,127
10. FORTUNA									
Lease	(No information in Record)								
Sale	43,125	136,625	142,400	172,125	243,225	206,275	193,950	214,900	131,800
11. PRIME									
Lease	21,104	18,965	30,522	24,278	26,795	22,264	22,927	30,652	52,995
Sale	49,837	82,142	89,122	74,381	96,320	85,542	62,754	65,778	57,098
12. C. I. C.									
Lease			(Not Available)		51,875	36,328	43,708	43,700	16,474
Sale			(Not Available)		118,125	0	0	108,750	11,000
TOTAL	$ 3,573,316	$ 4,030,616	$ 4,178,080	$ 4,723,457	$ 5,552,700	$ 5,939,563	$ 7,129,325	$ 8,528,116	$ 8,842,622
UNITED SHOE (Ex. P-68)									
Lease	$31,566,000	$26,493,000	$25,308,000	$23,907,000	$24,767,000	$23,182,000	$23,051,000	$23,184,000	$22,393,000
New Sales	737,000	1,311,000	793,000	1,269,000	768,000	800,000	1,242,000	1,102,000	1,639,000
TOTAL	$32,303,000	$27,804,000	$26,101,000	$25,176,000	$25,535,000	$23,982,000	$24,293,000	$24,286,000	$24,032,000

SOURCES:

1. Exhibit D-104. No figures available for revenues from sales of new machines 1955-63 (Tr. 1821).
2. Exhibits P-36, P-243, P-69. Includes figures for IVC.
3. Affidavit of Nov. 3 1966. No machines shipped on lease (Tr. 1851).
4. Exhibit D-109. No machines shipped on lease (Tr. 1878).
5. Exhibit P-211. Lease and sale figures are combined (Tr. 1907-8).
6. Exhibit D-111.
7. Exhibit P-176; accountant's statement of Nov. 3 1966. Sales figures are gross revenues; 90% are shoe machinery (Tr. 2010). Organized 1957.
8. Exhibit D-116. Organized 1961.
9. Exhibit P-115.
10. Exhibit D-129; calculated as suggested by Court at Tr. 2130.
11. Exhibits P-193, 194.
12. Letter Charles E. DiPesa & Co. (accountants) to C. I. C. Machinery, Inc., Nov. 18 1966. Entered U. S. market 1957 (Tr. 2189).

APPENDIX 1

(Excerpts from testimony of Richard A. Unger cited at p. 33 above)

Mr. WHIPPLE. Now, your Honor, we have two sample shoes here. I am prepared to have Mr. Unger take this shoe and show you how the shoe manufacturer would deal with it in connection with one of these flow lines on the chart, if that would enlighten your Honor. It won't take long.

It will show you the ways in which alternative processes and sub-processes are available to the shoe manufacturer in one stage in making this particular shoe. It won't take more than a minute or two. I would like to have Mr. Unger do it. I hope it will give content and meaning to the graphic presentation.

The COURT. If it will only take that long, you may proceed.

* * *

Q. What chart are you referring to in describing this?
A. Chart IV, the Lasting Methods chart.
Q. Do you have that chart before you?

Mr. WHIPPLE. I was addressing my question to Mr. Unger, your Honor, but I hope you do, too.

A. The shoe that we are going to——

Q. Wait until his Honor gets it before him. Then I want you to take it step by step, in your own way. You may proceed. A. The shoe that we have is a flat lasted shoe. The shanks have been staple lasted. The foreparts of the shoe have been cement forepart lasted. It is a one-piece, high heel, novelty shoe, and we will take it down through the Lasting charts.

Appendix 1

This shoe, being a flat lasted shoe, will be processed by the flat lasting shoe method portion, the lasting method portion entitled A FLAT. That is a process indicated to the left of the chart LASTING METHODS.

Inasmuch as it is a machine lasted shoe we will take the left-hand branch immediately below the diamond at the head of the chart. This will be following the red portion, the primary path or flow of shoes Flat Lasted. About 66 per cent of all the shoes Flat Lasted are machine lasted.

The next choice that is to be made for the whole flat lasting chart is a division between conventional footwear and canvas rubber footwear, the Autoclave method, this being the so-called example, this so-called conventional method, 52 per cent of the total flat lasted production, we will take the left-hand branch of that alternative.

The next choice the shoe manufacturer has is whether or not he will fasten the insole or not. This is shown by the dotted line connecting the box No. 1 entitled FASTEN INSOLE to that left-hand primary branch of Flat Lasting.

Q. The dotted line connoting an optional operation? A. Yes, that is correct. Almost all the conventional footwear manufacturers or so-called conventional manufacturers fasten their insole. A very, very small per cent, less than one per cent, do not.

This particular shoe had the insole fastened to the last.

The next choice that the manufacture has is a choice as how this shoe is going to be assembled to the last. The next alternative choice that he has is as to whether or not he is going to ASSEMBLE & BACKPART MOULD SEAT LAST this particular shoe by using A-3 operation on the left-hand branch of this next alternative, or whether he will take the most usual choice in 1964 which was to

dip the counter, the fiber counter, and then assemble the shoe to the last as a separate operation, or to preform the back part using operation A-1, which is a secondary choice within that primary choice, preforming the backpart using a multiple counter, and then subsequently assembling the shoe to the last using machine operation No. 3. It is difficult to tell usually as to whether or not an assembled backpart moulding is done or whether dipping the counter and then assembling is done without tearing the shoe apart. I do know that there is a tack hole in the lining of this particular shoe, which would indicate to me that it had been assembled with the use of a machine, operation No. 3. Therefore, undoubtedly this particular operation used the right-hand branch, either dipping the counter or using a preformed backpart. I can't tell if it is a fiber counter or a moulded counter.

* * *

The WITNESS: But, at any rate, it was use of the right-hand branch of that alternative and in connection with the Machine Operation No. 3 assembly.

We are now ready for the next operation which could include conditioning of the box toe or the printing on of a box toe as an optional operation. This is a soft box and thereby it was not conditioned, I don't believe with a——

Q. You are indicated the shoe; is that correct? A. This particular shoe. I could not tell with any great degree of certainty without tearing the shoe apart.

Q. Mr. Unger, keep your voice up, will you please? You are really trying to reach the court room and not just

me. Thank you. A. But on the assumption that a solvent-type box toe was used, I assume that, that means Operation No. 4, conditioning of the box toe, was used as an optional operation by this particular shoe manufacturer rather than the printing on of a box toe using the operation of A-4.

The next optional operation is that of softening the toes. This is an operation which, by the use of steam, softens the upper material to facilitate the pulling-over operation which is the next operation.

In this operation of pulling-over the manufacturer once again has another choice that he has at his disposal as to how this particular operation is going to be performed. He can either pull over and toe last the shoe as a combined operation as denoted by either the A-5, pull last with integral cementing, or the alternative to that for the combined operation of A-2, cement, and separate operation A-6, pull last with separate cementing. Both of those particular alternatives give the shoe manufacturer the alternative of doing the combined operation of pulling over and toe lasting.

In 1964, most shoe manufacturers in flat lasting performed the operation of pulling over as a separate operation.

I would assume that this particular shoe was done this way. I can see the tack marks in the upper material showing where the pulling over tacks were inserted to hold the shoe prior to toe lasting.

In the next step we find that the manufacturer has another alternative as to how he is going to side last his shoe. There are several alternatives at his disposal. He can perform the operation A-7 way to the left of the chart entitled, "Staples," or he can use the alternative metallic side lasting operation of A-8, tacks.

Appendix 1

Most high heel shoes, of which this is an example, use one or the other of these metallic fastening methods. Most of them, as is shown in the chart, 20 percent out of the 21 percent that was estimated to be processed by these two metallic alternatives for side lasting—20 percent of most high heel shoes. This 20 percent joins the 45 percent of the total flat lasted production which does not have a metallic shank lasting operation performed. And upon the diversion of 9 percent of hand side lasting for the canvas rubber footwear autoclave process and the addition of the 20 percent to the remaining 36 percent with a diversion of 9 percent hand side lasting, we have 56 percent of all flat lasted shoes estimated to have cement forepart lasting or cement side lasting.

The same machines shown here can be used either for cement side lasting or cement forepart lasting. Inasmuch as we have already shank lasted the staples and we have the forepart lasting to be performed, we are only talking about that portion, that use of these operations for forepart lasting.

The manufacturer has a choice as to whether he will do this forepart lasting with cement by the separate cementing alternative or the integral cementing alternative. Most manufacturers in 1964 used the alternative of the integral cementing.

As to this shoe, from the amount of cement that is on the side of it, the appearance of the cement, I would say it was lasted with the integral cementing alternative.

We have now lasted the shoe in the shanks and in the forepart. The next operation to be considered is heel seat lasting. At this point we have another alternative. Up at the head of the chart we had considered the alternative that the manufacturer had of performing operation A-3, as-

semble and backpart moulding, as an alternative to the assembling operation. If that manufacturer had chosen that particular alternative, he would have already heel seat lasted this shoe.

Now, back to where we are for the heel seat lasting; he would take the dotted line going to the left which shows that 4 percent bypass the heel seat lasting operation by virtue of having already seat lasted this shoe in Operation A-3.

Inasmuch as we have already determined this particular shoe had not been assembled in backpart moulding, we will have one of the two alternatives of heel seat lasting with tacks or with cement. The presence of a ring of tacks in the heel seat of this shoe indicates that 42 percent of the manufacturers of flat lasted shoes in 1964 chose—as this particular manufacturer chose also—the heel seat lasting operation No. 8 using tacks as a fastening means.

We have now completed the shoe except for the toe lasting—we have completed the lasting method except for the toe lasting portion; and at this point the manufacturer, once again, has the alternative of softening the toes once again to facilitate the lasting, toe lasting operation. Most manufacturers use the toe softening operation. The next choice is as to whether or not he's going to trim out the box toe and lining as an alternative operation or whether, if the shoe has combined lining or is unlined, this particular operation is not required.

This particular shoe is a lined shoe, leather lined shoe, and so is 18 percent of the manufacturers in 1964 manufacturing a flat lasted shoe, this particular shoe would have the box toe and linings trimmed out to facilitate the toe lasting operation.

It should be pointed out in this operation, as others, that in taking this particular one he does not necessarily

have to use the machines available for this particular machine operation.

6 percent of the people, 6 percent of the manufacturers trimmed out the box toe and lining by hand and 12 percent did it by machine.

Following trimming out the box toe and lining, we have the operation of applying the cement to the insole. The Operation A-16 completes the flat lasitng of this particular shoe, flat lasted shoe.

APPENDIX 2

(See Fn. 8 at p. 28 above)

2. With reference to machine count plaintiff has deliberately and systematically misstated United's share by adhering blindly to the 1949 formula based on a different market.

This effort centers in the tables identified by Mr. Epstein; he produced the material for the discussion at pp. 14-20 of the Government brief. From this material, by a series of eliminations and exclusions, plaintiff wrongly concludes that United's position in the sample shoe factories in 1963, with respect to the 18 leading categories, was practically the same as it was in 1947-9 (Govt. Br. 31).[3] Nothing could be more false.

First for the Epstein testimony.

Mr. Epstein did not claim to be an impartial expert. He participated "in the adoption of the theory of the case" (SM 339); did "not have complete autonomy" but was part of the staff (SM 397); and, as the Court perceived, "acted pursuant to a joint arrangement with Miss Brass" (SM 447). In this capacity he consented to represent the facts according to the Government's theory of the case, in the following manner:

> (a) Taking for the foundation of his machine count those United machines published on current terms at January 2 1964 (i.e. Ex. P-47), he excluded from his analysis any machines outstanding in factories of 100 models withdrawn by United before 1964 (SM 410-1). The result was to eliminate also all non-United machines similar to those models (SM 428).

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[3]The 1963 percentages at Govt. Br. 31 are an egregious misuse of evidence, because they are based on Ex. P-264 which was admitted only for the limited and different purpose of showing the need for a projection (SM 1799-1800).

(b) He also excluded United machines which at January 2 1964 were still distributed, subject to the obtaining of terms on application (SM 413, 422).[4] The effect again was to eliminate similar non-United machines.

(c) He further excluded non-United home-made machines in place in the shoe factories (SM 379), and the Government brief maintains that position notwithstanding the Court's clear indication that these are competitors for the purposes of this hearing (SM 381, 383).

(d) In obeying the theory of the Government case as a member of the staff, Mr. Epstein threw out the important innovation of the thermalaster for cement side lasting made by International Shoe Machine Corporation (SM. 425), and the Government adheres to that position notwithstanding this Court's intimation of disagreement (SM 426) and the recognition of that machine by the First Circuit Court of Appeals as "a technological break-through which produced spectacular commercial success for plaintiff [International]" (our Main Brief 46-8 [pp. 23-4 of the foregoing brief]). See also at p. 14 [17a] below.

(e) Pursuant to the theory elaborated in the Government brief Epstein also took out of his count 1057 competitive direct mold vulcanizing machines (SM 343, 429-30).

(f) In order to eliminate competitive machines Mr. Epstein misused the "Q" marking which defendant supplied in connection with the analysis of its machinery

[4] TOA or "Terms on Application" is a stage in the withdrawal of United models (our Main Brief 10-1).

sample, at the request of the Court itself.[5] That is, he consciously disregarded United's written interpretation of the meaning of the "Q" symbol in connection with the machinery classification Ex. D-6 which he was utilizing (SM 448-9). Conceding that he had no personal knowledge of shoe machine operations and could not himself determine whether a non-United machine was really competitive with the defendant's product, he chose to disregard the written description which was forwarded to Government counsel by defendant's counsel April 8 1966 in connection with the delivery of two print-outs requested by the Government (Ex. D-62):

"In this classification the following standard has been applied in designating non-United machines

[5]This letter "Q" prefixed to certain marks applicable to competitive machines under the column "Sym[bol]" in Ex. D-6 and other print-outs is described by Mr. Snow as a classification of the United Operating Departments "where they determined that the machine was not similar to United machines" (Snow SM 641). In pre-trial November 9 1965 the Court requested counsel to cooperate in analyzing the constituents of the United sample. Government counsel asked for this saying that they did not have the necessary expertise "to be able to say which competitive machines should be eliminated" (Pre-Trial Hearing 11/9/65 p. 13). After much colloquy the Court urged United to undertake the work of classifying the machines in the 1963 sample in accordance with the Government's request, without prejudice to our position that technological changes have altered the market (p. 19). At the next pre-trial hearing we submitted a memorandum developing our contention that the major and minor groupings of 1947-9 were no longer applicable and that fitting of the 1963 census into those categories would be a distortion for comparative purposes. At that pre-trial hearing on December 14 1965 the controversy as to the proper classification of United's sample was continued. The Court reserved judgment as to the correct analysis of the market for the purpose of measuring workable competition today (p. 51) and expressed its desire to get as much agreement as possible on the underlying facts without regard to what were the proper "pigeonholes" (pp. 51-2).

as competitive. A non-United machine is considered competitive when it performs in the same or a different way: (a) one or more of the operations performed by a United machine, or (b) one or more operations to accomplish the same function of shoe manufacture as is accomplished by one or more United machines performing a different operation or operations.

. . . The enclosed print-outs designate the corresponding United machine by its machine symbol in all cases except for those bearing the "Q" designation in the print-outs; *those are spelled out in the accompanying supplemental list entitled 'Non-United Machines Which Are Competitive With One or More USM Machines But Are Not Identified By USM Symbols On Attached Print-Out.'* Please understand that both in these print-outs and in the supplemental list the designation of United machine is not an exhaustive or all-inclusive one, *so that the respective non-United machine is or may be competitive with other United machines than those listed."* (italics supplied)

Mr. Epstein ignored these reservations for curious reasons.[6]

(g) The Epstein calculation was made also in disregard of the express reservation of United's counsel,

[6]See SM 448-9. They were "certainly worthy of consideration"; required penetrating thinking on his part; he "had been guided by the original designation as being accurate . . . because why should they tell the Government that a machine was competitive if it was not?"; so he disregarded these reservations "but only after a good deal of soul searching."

in communicating the classification of the 1963 census to the Government in the form of the 18 and the 12 machine categories, "that we [United] do not consider this classification a correct one for the purpose of measuring market share, that since 1949 the significance of the 30 classes as among themselves has greatly changed, and that whether in 1949 or in 1963 the classification would involve some arbitrary judgments" (SM 344-6). We recognize that for some purposes the 18 and 12 classification had to be made. That is, we felt obliged to accede to the Court's request in the pre-trial hearings that United lend its best judgment to the endeavor so that a comparison could be made between 1963 and 1949 *within the categories,* as the Court desired. Our point here is that the Government has pushed to an unconscionable degree the advantage it thinks it got by our so acceding to the Court's request, and has misused United's classification for an end result of distortion which defeats its very purpose.[7]

The result of these seven operations of Mr. Epstein is a mere travesty of the 1963 shoe machinery distribution. The Court recognized its artificiality as the testimony came in (SM 328-9), and with respect to the whole basis of the Government effort said at SM 350:

> "I have been thoroughly persuaded that the kinds of Tables which were used in my original Opinion

[7]Note Miss Brass's argument at SM 346 "that United in its print-out did classify and did put these machines into the categories as representing their best estimate . . ." etc.; and the contention at Govt. Br. 44 that United "has thereby recognized the appropriateness of these category descriptions with respect to the C-Day market."

> were not the best possible way of measuring the market, although they may have been the best that was offered at that time, and I would think it a grave error if I followed that same method now."

At the conclusion of the Epstein evidence the Court refused to strike his exhibits saying (SM 442)

> ". . . it is drawn from some but not from enough primary facts."

This is too kind a comment. In reality the upshot of the Epstein evidence and those portions of the Government brief based thereon is completely misleading and was intended so to be. Conceptually it is an absurdity, because the market analysis tendered by Mr. Epstein as a participant in the theory of the Government case is that, the more competition succeeds and the more of its original machine models United withdraws from the market, the greater the number of competitors' products comparable to the withdrawn models are excluded from the picture; the ultimate result, if indefinitely continued, would be to leave United alone in the field with a single model like the injection molding machine, with which competitors had nothing comparable, and United by that token would be a "monopoly" with 100% occupancy of its particular market. From the viewpoint of the users of shoe machines, *amici curiae* in their brief express the objection with felicity and with force (p. 21):

> "Thus, to ignore machines simply because they are not being currently offered by United, is to exclude from consideration the very developments which the decree was intended to stimulate. By excluding the new offerings of United's competitors, the Gov-

ernment is arbitrarily eliminating at the outset the very developments which would indicate an erosion of United's market power."

The degree of the distortion thus accomplished is startling. Mr. Epstein succeeded in excluding 3083 non-United or competitive machines as against 179 United machines, of a total of 3262, being more than 25% of the entire 1964 census count (SM 342).

The Epstein method was carried also into what the Government calls its shipment exhibits (Ex. P-60 etc.), and the figures at Govt. Br. 18-21 are vitiated by the same errors. By these erroneous methods Epstein reduced the 615 machines entering the sample factories 1963-4 by 182 units. Of the number so eliminated, only three were United machines and 179 were shipments by competing manufacturers (including 17 ISMC cement side lasting machines and 42 vulcanizing machines). In addition, of course, it is obvious the quantities involved are too small to support the percentages erected thereon at Govt. Br. 20.

In support of what we have said about this basic and systematic error of the Government presentation, we add the following:

(i). The Court's original standards were not as bad as the Government's present utilization of them causes them to appear. In other words, no other data were submitted in the main case for comparison with or correction of the OMIR and deposition testimony which Government trial counsel then employed as the basis for their exhibits. No alternatives were offered by defendant. Indeed, none other was available in the absence of substantial competitive forces (other than Compo) in the 1947-9 market. The error consists in carrying

the 1947-9 market structure into the present market as a Procrustean measure.

(ii) The exclusions of United and non-United machines made in the Government exhibits of 1949 were small and offsetting, because, as explained by Government counsel in the second day of these hearings, 364 machines distributed by United were eliminated as against 254 non-United machines (SM 347-8). This was a rough balance and did no harm.

(iii) The Government's exclusion of direct mold vulcanizing machines as no proper part of the market here under review is erroneous. The *amici* brief at pp. 21-2 demonstrates the error. The necessity of taking into account such vulcanizing machines is shown also by the concession of Government counsel about the injection molding machine as part of the market (SM 92-3). The competition of injection molding with the vulcanizing process was recognized by the witness Hardy at SM 90 and 93-4. Mr. Marcy's testimony (SM 1036-51, 1063-80, 1134-41, 1148-56), with the exhibits D-78 and D-578 (photographs) produced and described by him, shows a close similarity and almost complete substitutability of shoes of different constructions.[8] It shows that footwear with rubber soles vulcanized to a

[8]The Govt. Br. 25 statement that Marcy testified that canvas upper shoes, while comparable to fabric upper with rubber or plastic soles "do not compete with, for example, men's dress shoes" does not accurately paraphrase his testimony. He said that men's dress shoes compete equally if they are pre-molded, injection molded, or made by the cement process. He was then asked, "if they compete equally among those three, do they compete equally with the canvas upper?" He responded, "No, not the same shoe." (SM 1153). This is an obscure answer; but the important point is that the three constructions first described are comparable to a standard welt (golf shoe) or a stitch-down dress shoe (SM 1046, 1050; Ex. D-78, B-3, C-1, C-2, C-3).

fabric upper, as well as a leather upper, are part of the shoe industry just as much as the so-called conventional shoes (SM 1079-80).

Direct mold vulcanizing is not just another way of making sneakers, as the Government would have the Court believe. As James H. Cheek testified, rubber and rubber compounds have in the decade here involved largely replaced leather for outsoles and heels (SM 1361). In these circumstances it was inevitable that new methods of attaching rubber and compound soles and heels would be developed. Henry Hardy, of IVC and Compo, first saw the direct mold vulcanizing operation and machine in a French shoe factory making shoes with leather uppers (SM 153). Gordon Cooper sold IVC's Desma machine to shoe factories for work with leather as well as fabric uppers and to factories which replaced earlier sole-attaching methods with direct mold vulcanizing (SM 982-5). Mr. Cheek's company, Genesco, Inc., adopted an earlier method and equipment and later Desma and CIC equipment in shoe factories producing leather upper shoes and making such shoes by other sole-attaching methods; and it distributes these shoes through the same channels as all others (SM 1372-6). All this evidence makes somewhat ridiculous the Government attempt to liken the operations to autoclave, to limit its products to fabric-rubber of the sneaker type, and to exclude from shoe factories those making direct mold vulcanized shoes with either leather or fabric uppers. As Mr. Cheek said, the Bureau of Census definition of fabric-rubber producers and rubber factories may be all right for the Census, but the Genesco factories producing these shoes are shoe factories (SM 1377-8, 1396).

Indeed the Court said during the hearings (SM 670-1):

> "I might as well put on the record what I said off the record, that as presently advised I regard any factory which manufactures shoes as a shoe factory. . . . I think we should exclude what was excluded before as a rubber factory . . . But that is all I have intended to exclude so far."

Colloquy of counsel with the Court at SM 778-98 led to the inevitable conclusion by the Court that the language of the Decree as modified was very broad and included every kind of factory which made footwear (SM 796). Any other conclusion would have involved the absurd result that during the decade under review with respect to an increasing number of shoe factories that utilized direct mold vulcanizing machines for a process increasingly popular United was not restricted by the Decree at all—an absurdity which Government counsel refused to confront (SM 791) and still seeks to escape.

(iv) As regards the ISMC thermalasters which Mr. Epstein excluded, the Government brief continues to insist that they are not competitive with United machines (p. 74), contrary to the evidence of the witness Becka (SM 34), and contrary also to Ex. P-158. This latter exhibit, an affidavit by J. S. Kamborian, describes the thermalaster models B, D and E, introduced in 1956-8, as competitive with two models of United's staple side laster, two models of its cement forepart laster and its Model C platform cover laster (Ex. F to P-158).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 597

UNITED STATES OF AMERICA, *Appellant*,

v.

UNITED SHOE MACHINERY CORPORATION

On Appeal From the United States District Court for the District of Massachusetts

BRIEF OF THE NATIONAL FOOTWEAR MANUFACTURERS ASSOCIATION INC., AND THE NEW ENGLAND FOOTWEAR ASSOCIATION INC., AS AMICUS CURIAE

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STATEMENT OF INTEREST

The National Footwear Manufacturers Association, Inc. and the New England Footwear Association, Inc. ("*amici*") respectfully file this brief as *amici curiae* because of the concern of their members that disposi-

tion of this appeal as asked by the government would set in motion proceedings whose ultimate result could be injurious to the economic condition of the shoe manufacturing industry. Written consent of all parties to file a brief was given under Rule 42(2).

The National Footwear Manufacturers Association is a trade association incorporated in 1922 under the laws of the state of New York with principal offices at 342 Madison Avenue, New York, New York, representing 245 footwear manufacturers operating 400 factories located throughout the United States. The New England Footwear Association is a trade association incorporated in 1871 under the laws of the state of Massachusetts, having its principal offices at 4574 Prudential Building, Boston, Massachusetts, and representing footwear manufacturers operating 250 factories throughout the New England states. The associations support affirmance of the decision of the lower court, 266 F. Supp. 328 (D. Mass. 1967), JS App. A 25).

By operation of paragraph 9 of the district court's 1953 decree, both associations first entered the proceeding as *amici curiae.* Both associations, upon specific action of their respective governing bodies, were directed to participate in the C Day proceedings, to the extent permitted by the district court, to advocate continuance of the decree in its present form, and to oppose both the petition of United and that of the government for modification thereof. Accordingly, *amici* by leave of the district court took an active part throughout the C Day proceedings. The district court commented upon the degree to which *amici's* participation was useful to it (266 F. Supp. at 335, JS App. A 38).

The associations on whose behalf this request is made represent the substantial majority of shoe manufacturing companies and factories in the United States and, therefore, speak for the principal domestic customers of appellee. The availability of modern efficient shoe machinery is basic to the operation of the shoe manufacturing industry, and accordingly, the industry is vitally concerned with and would be immediately and directly affected by any government action which might effect or set in motion procedures leading to a structural realignment of a supplier industry. The district court recognized the interest of the shoe manufacturing industry by referring to it in the C Day opinion as, ". . . among the chief intended beneficiaries of this Court's decree . . ." (266 F. Supp. at 335, JS App. A 38). Our deep interest in this proceeding is confirmed by the government in its cognizance that any relief in the nature of reorganization should not work hardship on the American shoe manufacturing industry (Gov't. br. 49).

The members of *amici* have been uniquely situated to observe the day-to-day functioning of the decree over the past ten years. Their relationship with United during this period has often been marked by vigorous dispute respecting interpretations of the provisions of the decree. The proper machinery lease-sale conversion ratio to be established under paragraph 9 of the decree was hotly contested by representatives of *amici* and United with the result that the aggregate sale value was substantially decreased and conversion purchases became extremely attractive to shoe manufacturers.[1] *Amici* strenuously opposed United's petition

[1] See Kaysen, *United States* v. *United Shoe Machinery Corporation*, 311-321 (1956) [hereinafter referred to as Kaysen].

for modification throughout the C Day proceeding. We are equally strenuous in our opposition to the government's efforts to modify this decree.

Amici have concluded that the decree is effectively working in continuing to generate a smooth transition toward a substantially more competitive shoe machinery market and toward the dissipation of United's unlawful market power. Today the shoe manufacturing industry has benefitted from increasing competitive alternatives in every important sector of shoe factory demand. Equally significant, these sectors are being served by a large number of suppliers who are entering the shoe machinery industry at an increasing rate. The progress made under the decree in the past decade is remarkable in light of United's pre-decree market position and the essential characteristics of the shoe machinery market.

In the opinion of the shoe manufacturing members of *amici,* economic conditions in the shoe industry and competition generally would be best served by continuing the decree in its present form so that its full erosive force on the structure of the shoe machinery market might be exerted. The government asks this Court, in essence, to disrupt the operation of the decree and initiate steps whose only proper result from the government's viewpoint would be dissolution or divestiture. As is explained in this brief, the shoe manufacturing industry is firmly of the opinion that such surgical relief is not only unnecessary to cure the evils which resulted from unlawful monopolization, but would create serious hardship for shoe manufacturers.

SUMMARY OF ARGUMENT

I

The district court properly considered the petitions for modification. The context and the particular nature of the decree must not be overlooked. For more than fifty years, since United's formation in 1899, and through three separate challenges by the government,[2] its share of the shoe machinery industry and relationship to the shoe industry had been essentially undisturbed until the present decree was entered. The 1953 decree constituted an explicit design to accomplish the recognized objectives of depriving defendant of the fruits of monopolization and dispersing its unlawful market power (110 F. Supp. at 347) while at the same time avoiding irreversible steps, confiscatory to defendant and tending to injure, rather than promote, more salutary economic conditions in the shoe manufacturing industry (*Id.* at 348).

The 1966 (C Day) review was called for by the decree to assure that the relationship between expectancy and event would be subject to review. In that hearing, the court received a cascade of statistical and other evidence tendered by the parties. The government's assertion that the district court improperly applied *United States* v. *Swift & Co.*, 286 U.S. 106, to government-sought modification of antitrust decrees as well as its implication that its opportunity to present full proof was arbitrarily truncated overlooks the fact that Judge Wyzanski, while citing and expressing some reliance on this landmark opinion, in fact delved into

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[2] *United States* v. *Winslow*, 227 U.S. 202; *United States* v. *United Shoe Machinery Co. of New Jersey*, 247 U.S. 32; *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451.

the parties' extensive evidential offerings and excavated numerous positive findings demonstrating, we submit, that the decree was operating extremely well and modification—entirely apart from any *Swift* doctrine—was simply not warranted. (Pt. I, *infra*).

II

The district court's conclusion that the decree has stimulated a substantial, albeit gradual, erosion of United's pre-decree market power is correct in the judgment of *amici,* whose members have observed the operation of the decree and the performance of the shoe machinery market on a daily basis for the past decade. The highest supportable measure of a 1963 United "market share" of approximately 62 percent (based on revenues), compared with the estimated market share in 1953 (1947-1949) of between 75 and 90 percent, ". . . probably 85 percent" (110 F. Supp. at 339), represents a startling decline of its market occupancy in view of the fact that substantial revenues are necessarily attributable to machines leased even before entry of the decree. This evidence would affirmatively demonstrate the effectiveness of the decree even if other, more significant, gauges of market share and competitive vitality were not present. In fact other record data relied upon by the district court strongly support the conclusion that United's position across the entire shoe machinery market has slipped to approximately 50 percent since the decree was entered and United's machines outstanding on lease in shoe factories, when validly projected, represents only 17 percent of all shoe machines in position in shoe manufacturing plants.

United confronts competition in all phases of shoe factory operations where competition might have rea-

sonably been expected to develop. The absence of the barriers to entry which were, in large, responsible for United's monopoly poistion, will cause this erosion of its market position to continue and new competition will be attracted to those areas where it might flourish, just as new competition has developed and succeeded under the operation of the decree to date. The significance of this is highlighted by a steady trend in the shoe industry away from those machine lines where United's position has historically been most entrenched to those where it faces extremely vigorous competition. Since the correctness of the district court's findings is not challenged, the only tenable objection of the government is that the decree has not worked as rapidly as it would like. But the effect of the decree has been as great as could be legitimately anticipated in the context of such market factors as the unattractiveness of the shoe machinery industry, the basic stability and slow overall growth of the shoe manufacturing industry, the disincentive to entry in the numerous machine lines which offer an opportunity for less than six transactions per year and the substantial ownership in shoe machinery by shoe manufactures achieved by virtue of conversion sales in the first effective year of the decree. (Pt. II, *infra*).

III

In the same spirit that the government "tentatively suggests" avenues of divestiture, it is appropriate that the *amici* identify the broad bases for their concern that any relief of this nature would operate to their disadvantage and that of competition generally. Any present effort to divest assets, facilities and personnel from United's Beverly, Massachusetts factory would

involve the same physical impediments, uncertainties and possible losses in industry efficiency which were noted by the district court in 1953. Alternative divestiture techniques, even if available, would equally lead to unfortunate results.

Any consideration of a remedy so drastic as dissolution or divestiture must take into account the competitive forces which have appeared in the market under the decree. Since 1953, a large and steadily increasing number of competitors have entered the shoe machinery market and pre-existing competitors of United have enjoyed rapid growth. As a result, there is no question under the decree of the capacity for limited line companies to enter and thrive in areas of substantial shoe factory demand. The maintenance of market conditions which will continue to permit the appearance and success of such companies is highly desirable from the viewpoint of shoe manufacturers. The structure of the shoe machinery market is such that even if it were possible to create two or more viable full-line companies, they might occupy the whole of the market and alter irrevocably the characteristics of competition in the shoe machinery market, and the shoe industry would be ill-served by the elimination of competitive opportunities for the many limited line companies.

There are sectors of the machinery market where shoe factory demand is relatively slow, where annual transactions are few and which are not and will not be especially attractive to new entry. Here particularly the possible dismemberment of United holds serious threats for the shoe manufacturers. Historically, United has been an important source for research and development in shoe machinery manufacturing. In these sectors of the market, United remains the most

important source of machinery research and development. In the face of dismemberment, United's incentive to continue shoe machinery research at its present level, much less to increase it, could, in the opinion of *amici,* be severely diminished. United has already diversified to a substantial extent into many other markets, and we are concerned that the government's proposed disposition of this proceeding will greatly accelerate this trend to the detriment of the shoe industry. United has also provided full service for these thin markets. Acceptance of a full-line position for United may permit a spreading of costs which makes available continued offerings at acceptable lease and sale prices in slow turnover machine lines, and inhibits the possible abandonment of leasing, or both leasing and sale in some of these markets.

ARGUMENT

I. The Standards and Scope Applied by the District Court in Reviewing and Continuing the Decree Were Entirely Consistent With Antitrust Principles and Precedents.

It is axiomatic that a paramount test of the effectiveness of an action based on monopolization is whether the relief imposed deprives the monopolist of the fruits of monopolization and disperses the unlawful monopoly power condemned by section 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 USC § 2 (1964). The government thus correctly cites a line of decisions by this Court commencing with *United States* v. *United States Gypsum Co.,* 340 U.S. 76, to the effect that relief may be the most important aspect of an antitrust case.

At the same time, however, antitrust remedies have been described as essentially predictive and dependent

to a great extent on the history and nature of the market involved.[3] Irreversible remedial sanctions, such as dissolution, should be avoided where there is a danger that what remains thereafter may be less consistent with antitrust goals than could be achieved otherwise.[4] This approach dissuades the use of mechanical formulae in determining relief, whether on first adjudication or on review. It comprehends, rather, an intensive analysis of competition in the context of existing industry conditions and teaches that generalizations conducive to judging remedial sanctions in one market are not transportable into another.

It is, therefore, important to gauge the effectiveness of the decree herein against the context of the shoe machinery industry to determine whether the decree is operating, as intended, to eliminate immediately United's unlawful conduct and to dissipate United's unlawfully-acquired market power as fully and expeditiously as is feasible and desirable. We submit that the district court undertook precisely this sort of review.

Created by amalgation of several shoe machinery companies in 1899, United almost instantaneously occupied aproximately 80 percent of the relevant market.[5] This position was solidified by a lease-only policy and the establishment of lease provisions which, in many respects, effectively bound the shoe manufacturing industry to United. This position and the ties to the

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[3] Professor Kaysen, commenting on the main case, indicated the difficulty in assigning any precise time span to assessment of effective relief in this case. Kaysen, at 271-272 (1956).

[4] Markham, *An Alternative Approach to the Concept of Workable Competition,* XL American Econ. Rev. No. 3 (June, 1950).

[5] See Whitney, *Antitrust Policies,* 120 (1958).

shoe industry were sustained for more than 50 years, despite three prior government attacks,[6] until the 1953 decision of the district court, which was affirmed by this Court in 1954 (347 U.S. 521).

For a variety of reasons, only one of which was the impracticality presented by the location of all of United's shoe machinery manufacturing facilities and personnel in one plant, the district court declined to put into effect any plan of dissolution but chose instead relief designed to terminate forthwith the practices whereby United had monopolized the market and to set in motion a substantial force for the creation of effective competition (110 F. Supp. at 349-350). In doing so, the Court was expressly aware of the limitations, *ex officio,* on judges' ability to forecast the results of remedial economic sanctions and that dissolution would be essentially irreversible should it turn out to have been erroneously imposed (110 F. Supp. at 347-348). Having selected a form of relief which was designed to eliminate the pre-decree barriers to increased competition, to open the market to new entry and to encourage the growth of smaller shoe machinery manufacturers, the district court prudently insured by paragraph 18 of its decree that the effectiveness of the decree and the condition of the market would be brought before it after a reasonable period of time.

Thus, the decree when it was entered was consistent with antitrust objectives in that by eradicating the restrictive lease provisions which bound the shoe industry to United, abolishing the "lease only" system and requiring licensing of certain patents, it extirpated unlawful practices and deprived United of many of

[6] See note 2, *supra.*

"the benefits of the illegal conduct",[7] (see *United States* v. *Grinnell Corp.*, 384 U.S. 565, 577), and launched the force for dispersal of monopoly power.

In accomplishing the review called for by paragraph 18 of the decree, the district court made detailed findings covering virtually every aspect of the changes which have occurred in the shoe machinery market since 1955. Specifically, the district court found, *inter alia,* (see II, *infra*) that United's market share computed on the basis of current revenues declined from 85 to 62 percent and that United's share of current machine shipments was close to 50 percent. The Court found further that United's shoe machinery lease and sale volume declined from $32 million in 1955 to $24 million in 1963 while its 12 most important competitors doubled their gross revenues during the same period, and that the before tax earnings of United's Shoe Industry Group, exclusive of conversion sales, declined from $11 million to $6 million over the period of the decree. It also found that of the machines in position in shoe factories only 54 percent were of United origin and only 47 percent had been leased or bought from United and only 17 percent were on lease from United in 1963, that United has faced important competition from an active second hand market, that entry of shoe machine manufacturers had occurred since the decree, and that there was a declining significance to shoe manufacturers of the sole categories using machine types where United's position was most substantial. Finally, the Court found that United was without significant competition in certain sectors of the shoe machinery in-

[7] United was further immediately deprived of the fruits of monopolization by being required to divest itself of certain shoe factory supply operations. 110 F. Supp. at 353.

dustry, principally in those areas where the markets were thin and characterized by slow turnover.

On the basis of these findings, the district court reached the ultimate conclusion that, ". . . the 1953 decree has operated in the manner and with the effect intended" (266 F.Supp. at 334, JS App. A 36). The nature of the inquiry undertaken by the district court was whether the decree is substantially effecting its expressly stated objective to "gradually diminish" the magnetic hold on the market formerly enjoyed by United (110 F. Supp. at 350). Upon an exhaustive study of present economic conditions in the market, the district court held that the decree was continuing to exert this force and concluded that it should not be disturbed. This standard of review is entirely consistent with antitrust principles and precedents and neither party can properly complain of its inadequacy. While the government charges application of an erroneous standard, the result below was dictated by a clear evidence of the steadily erosive impact of the decree and the inability of the government to contradict this evidence under an entirely proper standard.

This standard is not modified by the introduction of the term "workable competition".[8] As the district court stated, the intent of this phrase was to signify the objective of a gradual erosion of United's market power. The test of the decree's effectiveness, therefore, as seen by the district court, was whether it is continuing to create more competitive conditions in the

[8] The inability to assign a definitive legal meaning to the term is conceded by the government (Gov't. br. 43). See also a discussion of the variety of meanings which might be accorded workable competition in Kaysen and Turner, *Antitrust Policy*, 81, 82, (1959). [Hereinafter referred to as Kaysen and Turner.]

shoe machinery market consistent with the objectives of the Sherman Act.

In reviewing the decree under this standard, the district court adopted a pre-trial order entirely consonant with the standard itself. The district court first addressed the threshold question: whether any modification whatever would be appropriate in light of the operation of the decree. Both parties and *amici* were afforded the opportunity to submit proposed pre-trial orders for the consideration of the court. The court properly selected those categories of information, similar in many respects to that upon which it relied in 1953, which would best enable it to assess the effectiveness of the decree during its tenure in establishing competition in the shoe machinery market. The court in this first inquiry decided not to accept evidence as to a suggested program for divestiture. This determination is perfectly in accord with sound judicial procedure in ascertaining first whether any relief is called for and only upon reaching an affirmative conclusion as to the need for further relief to hear detailed evidence as to the terms thereof. Any other approach would, of course, absorb the court's time in exposure to a morass of information which might be altogether unnecessary.

The government was not in fact foreclosed by operation of the pre-trial order of which it complains (Govt. br. 12-14, 47) from introducing any substantial evidence it proffered to show why modification of the decree is necessary. Moreover, the government has not suggested any evidence that might have been proffered but for the pre-trial order.

In the final analysis, the standard actually employed by the district court differs from that urged by the

government principally with regard to the time within which relief consonant with antitrust goals must be terminally accomplished. Despite the government's contrary implication (Govt. br. 42-44), there is nothing either in the district court's 1953 decision and order or in underlying antitrust authorities which suggests any objective other than a gradual restoration of workable competition to the shoe machinery market and, equally important, there is likewise no suggestion that such restoration be accomplished within any fixed, prescribed time period. The refusal of the court to set a definite date by which the decree must be fully effective or be modified to provide for more drastic relief is fully in accord with antitrust principles. Rather, given the limitations of trial judges, *ex officio*, as economic forecasters (110 F. Supp. at 347, 348) the imposition of rigid deadlines would be wholly inappropriate. It is enough that the decree is continuously and substantially working to remove the effects of unlawful monopolization from the market place, so that this goal might be realized within a reasonable period of time in light of the character of the industry involved.

The government asserts that the provisions of paragraph 18 of the decree establish a time limit within which it must be fully effective (Govt. br. 42-44). The district court has unequivocally stated that such was not the intent of this provision, but that it wanted to be sure of the opportunity to review the decree's effect in eroding United's unlawful market power and serving its express objective of establishing workable competition (266 F. Supp. at 334, JS App. A. 36, 37). The plain language of paragraph 18 bears out this interpretation of its meaning. Review is evoked to determine the effect of the decree "in establishing" work-

able competition, not to assess whether workable competition had in fact "been established" by C Day. The district court plainly identified this objective through its emphasis on gradual diminishment of United's market power in its 1953 opinion (110 F. Supp. at 350). Had the decree been intended to establish a time certain for the evaluation of its ultimate impact, it could easily have been precisely drafted to provide therefor.[9] In this light, there can be no valid claim of surprise as to the district court's interpretation of paragraph 18.

Certainly, if the decree were not having any substantial effect in moving the market toward more effective competition, now or in the future, modification involving more drastic remedies might be appropriate. But the district court found that the decree is having this substantial effect, and, in the opinion of *amici,* it should be allowed to continue to exert its effect as presently constituted. At the same time, any implication that if the decree is not modified now, the government will be forever deprived of the opportunity to seek modification, regardless of subsequent economic developments is without substance. Jurisdiction of the cause is permanently retained by the district court and a petition for modification on proper grounds and supported by substantial evidence might be filed by either party at any time.

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[9] Provision for further relief in the event that certain contingencies have or have not occurred within fixed time spans are not unique in antitrust decrees. See, e.g., such provisions in United States v. International Harvester Co. (D. Minn. 1918), quoted in United States v. International Harvester Co., 274 U.S. 693, 697; and more recently in United States v. General Motors Corp., 1965 Trade Cas. ¶ 81,802 (E.D.Mich. 1965).

The government devotes substantial attention to its argument that the district court erred in applying the principles laid down in *United States* v. *Swift & Co.*, 286 U.S. 106, to the government when it seeks modification of an antitrust decree (Govt. br. 34-41). *Swift* is, of course, the landmark decision of this Court regarding modification of antitrust decrees, and it would probably be as difficult to find a judicial decision on this subject which did not cite *Swift* as it would to find a merger decision which did not cite *Brown Shoe Co.* v. *United States*, 37 U.S. 294. The fact remains that *Swift* has been consistently followed by the courts, *Morse-Starrett Products Co.* v. *Staccone*, 205 F. 2d 244 (9th Cir. 1953); *Bigelow* v. *Twentieth Century-Fox Film Corp.*, 183 F. 2d 60 (7th Cir. 1950); *United States* v. *Lucky Lager Brewing Co. of San Francisco*, 209 F. Supp. 665 (D. Utah 1962), and the government fails to identify any authority for its proposition that the government is entitled to a preferred position.

More important, however, the district court, despite its citation of *Swift*, embarked on a far-reaching review which was not confined by *Swift* criteria. As described above, the district court searched and weighed all aspects of the shoe machinery market and affirmatively concluded that the decree is steadily creating a substantially more competitive climate in the shoe machinery industry. The findings of the district court and its affirmative conclusion as to the present effectiveness of the decree sharply contrast from the essentially negative findings and conclusion which might have sufficed had *Swift* been accorded exclusive reliance.

II. The Decree Is Working in the Manner Anticipated When It Was Entered To Create Workable Competition and To Deprive United of the Benefits of Monopolization.

It is apparent that the government does not seriously contest the findings of the district court. There is no claim that these findings were clearly erroneous or were otherwise fatally defective under any other standard. On this basis of the evidence, the district court perceived a clear and fundamental portrayal of changed economic conditions in the shoe machinery industry since entry of the decree. Its findings on this basis led to the ultimate conclusion that the decree is exerting a rolling force in thrusting the shoe machinery market toward workable competition. The *amici*, whose members have been intimately associated with the operation of the supplier market under the decree are in full agreement with this ultimate finding.

The district court, and apparently the government, conclude that the most illuminating facts respecting the effectiveness of the decree relate to the respective market shares of shoe machinery companies as gauged by current revenues (266 F. Supp. at 331, JS App. A 30, 31; Govt. br. 26). From the revenue calculations, the district court found that United's 1963 market share was approximately 62 percent. On first receiving the government's revenue exhibit, the court accurately observed that if it were the sole basis for determining market shares, it "... would be a very striking exhibit on behalf of United" (Tr. 552). Although revenue information as to United's competitors and the shoe machinery universe were not available in the main case, the extent of United's market position from almost any angle was approximately 85 percent (266 F. Supp. at 331, JS App. 29, 30). United was estimated to be supplying more than 75 percent, "... probably

85 percent'' of current market demand (110 F. Supp. at 339). In point of fact, this estimation probably *understates* United's pre-decree revenue position in the shoe machinery industry, since United's machines both then and now tend to be more complex and costly than those supplied by its competitors (e.g., D. Ex. 26, admitted Tr. 609, App. A, 14a, 15a).

Nevertheless, even accepting the conservative 85 percent figure as a fair measure of United's pre-decree shoe machinery revenue position, the decline to approximately 62 percent constitutes a striking demonstration of the erosive effect of the decree. In the words of the district court, this evidence establishes, ". . . a shrinkage of more than a quarter of the share of the market that it had in 1953'' (266 F. Supp. at 331, JS App. A 31). The government points to the fact that 62 percent is a large market share (Govt. br. 26), but this statement ignores the dramatic decline of nearly 25 percentage points[10] in the market occupancy, as indicated by these revenue data, enjoyed by United since the turn of the century that has been accomplished in barely 10 years. This development represents a startling disintegration of the hold United formerly had on the shoe machinery market, particularly in view of evidence which indicates that as much as 75 percent of United-made machines in shoe factories in 1963 were shipped prior to 1955 (D. Ex. 16, admitted Tr. 966). A snapshot of the current shoe machinery market is inconsistent with the concept of workable competition which places a high value on developments over time.[11]

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[10] If the relatively greater complexity and cost of United's machines are taken into account, the actual decline in revenue-based market share is probably in the range of 30 percentage points.

[11] See J. M. Clark, *Competition as a Dynamic Process*, preface, ix (1961).

Moreover, there is substantial basis for concluding that the revenue expressed market share of 62 percent, which includes revenues from machines placed on lease in prior years, substantially overstates the market position actually held by United. Shoe factory inventory information, of the sort which was crucial to the district court's 1953 decision (110 F. Supp. at 309), indicates an even more precipitate decline in United's market share since the decree. On the basis of a validly-projected 47-factory sample, the district court found that of the shoe machines in place in shoe factories as of 1963, approximately 54 percent were of United origin and that only about 47 percent had been purchased or leased directly from United (266 F. Supp. at 332, JS App. A 31, 32; D. Ex. 21, admitted Tr. 718). These figures correctly reflect the potency of the decree in actually and prospectively creating a vigorous and viable second hand shoe machinery market, since those United machines purchased from other sources constitute for the most part the present operation of that market, while machines purchased directly from United have passed from that firm's dominion and now constitute substantial potential competition. Therefore, we view the district court's finding that machines presently leased from United comprise only 17 percent of current shoe factory inventory as especially important. A principal objective of the decree was to loosen the leasehold ties between United and the shoe industry, and the reduction of the market share represented by United's leased machines from 85[12] to 17 percent is irrefutable evidence that this objective is being served.

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[12] As a result of United's pre-decree lease-only policy, virtually all United's machines were on lease prior to 1953.

A further significant indicator of the structure of the current market is the district court's finding that United's share of market represented by current (1963) shipments was approximately 51 percent, derived from a weighted average of market shares distributed among the "major" and "minor" categories used to determine market structure in the 1953 decision (110 F. Supp. at 304-306). While the district court fully appreciated the unreliability of these obsolete groupings for purposes of decree review (266 F. Supp. at 331, 333, JS App. A 30, 35, 36), as not revelatory of the numerous technological changes which have occurred in the past 10 years (266 F. Supp. at 331, JS App. A 30) whose stimulation was one of the root goals of the decree, the overall decline to 51 percent of current shipments dramatically describes the inroads presently being made by United's competitors.

In any event, the statistical evidence forming the basis for the district court's opinion and portraying all facets by which United's market share might be assessed demonstrates a decline from 85 to approximately 50 percent.[13] Thus, in the first 10 years of its operation, the decree has brought the shoe machinery industry to the brink of total elimination of what the present Assistant Attorney General has described as "undue

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[13] Although not attacking the district court's findings as clearly erroneous or otherwise improper, the government implicitly does so by introducing its highly questionable transposition of United's shoe factory inventory survey into the "major" and "minor" categories (Govt. br. 11). Apart from the fact that the district court rejected it as neither appropriate or necessary to the decision (266 F. Supp. at 331, JS App. A 30), this evidence is permeated with improper assumptions and exclusions. Trial brief for Amici at 18-23; Trial brief for Defendant at 5-14.

market power," [14] and to the stage where it has entered the spectrum of workable competition.

Market share evidence is, of course, responsive to only one standard by which the extent of competition in a market can be evaluated. Even an analysis of competitive conditions based on market structure theory alone necessitates consideration of other factors including trends as to the character of competitors, independence of action and ease of entry.[15]

The district court's findings as to these factors lend additional sustenance to its conclusion that the decree is effective. Thus, during the decree period, United's shoe machinery revenues declined from $32 million to $24 million while the gross revenues of its 12 most important domestic competitors almost doubled (266 F. Supp. at 331, JS App. A 31).

The record of new entry and growth of existing competitors similarly typifies a market which is steadily becoming more effectively competitive. As the district court found, "The pace of entry into the market in each three-year period after the decree increased: from 11 to 19 to 26, or a total of 56 companies" (266 F. Supp. at 332, JS App. A 33). Not only did the revenues of its 12 most important domestic competitors approximately double during the decree period to date, but that of its largest present competitor, International Shoe Machinery Corporation, more than tripled (Trial Brief for Defendant at 15, portraying in tabular form several of defendant's exhibits). The district court also found that a second hand market with 1963 sales of approxi-

[14] Kaysen and Turner, at 98.

[15] *Id.* at 71.

mately $3 million afforded United important competition to the degree that a shoe factory could start in business and fully satisfy its machinery needs, using many United machines, without buying or leasing a single machine from United (266 F. Supp. at 332 JS App. A 33).

A most significant indicator of the effectiveness of the decree in dissipating United's former market power and opening the shoe machinery industry to substantially more competition is the unanimous and representative testimony of shoe manufacturers on this subject. This testimony, in affidavit form, was admitted pursuant to stipulation as the direct testimony of the affiants (D. Ex. 24-44, admitted Tr. 609) and was relied upon by the district court (266 F. Supp. at 332, JS App. A 33, 34). Selected excerpts from these affidavits are reproduced as Appendix A to this brief (pp. 1a-13a, *infra*).

This evidence establishes that shoe manufacturers, who have daily observed the operation of the decree and the functioning of the shoe machinery market thereunder, uniformly conclude that in every major sector of shoe factory demand there is free competition permitting the selection of that machinery, regardless of source, which on the basis of merit is best suited to the appropriate shoe-making process. The following overall conclusions in this regard are typical:

> "There now exists in the shoe machinery market full and free competition allowing us as manufacturers to select our machinery as we wish on the merits of the machines available and in accordance with the processes we select to meet the various style changes which are constantly imposed on us

by the market" (Affidavit of Francis H. Gleason, App. A, p. 1a, D. Ex. 25, admitted Tr. 609).

"I am convinced that this market has changed radically from when I first entered the shoe industry. Neither we nor any shoe manufacturer are dependent upon United Shoe Machinery Corporation. There is plenty of competition in the shoe machinery business. Salesmen for competing concerns—both new and second hand—visit us and solicit our business constantly" (Affidavit of Milton Carmel, App. A, p. 5a, D. Ex. 32, admitted Tr. 609).

"The big change I have seen in the last ten years is the growth of new competition in shoe machinery, and the greater number of new types of machines which are offered, . . . I find ample competition among machinery manufacturers, and I am able to be flexible and selective in acquiring machinery" (Affidavit of Samuel Wolff, App. A, p. 8a, 9a, D. Ex. 37, admitted Tr. 609).

"There are also many more different types of machines now available than in 1955. In addition, there is a variety of European machinery available in this country, even for the welt process. It is hard to think of any particular United machine for which you cannot now obtain an adequate substitute" (Affidavit of T. R. Volenetz, App. A, p. 9a, 10a, D. Ex. 38, admitted Tr. 609).

In sum, this evidence, perhaps more than any other, portrays a continuing force in the market toward more competition, in accordance with the objectives of the decree.

These observations by persons who have most direct knowledge of conditions in the shoe machinery industry are supported by the analysis of defendant's witness Dr. Fox. Evaluating economic conditions in shoe

machinery manufacturing from a variety of perspectives and placing a premium on rates of entry, Dr. Fox concluded that the decree had exerted a significant influence in expanding the sources of machines available to shoe manufacturers and predicted that United would face even stronger competition in the future than at the end of 1964 (A. 66). *Amici* believe that this analysis substantially corroborates the judgment of shoe manufacturers that, since the decree, numerous and fully satisfactory alternative machinery offerings have become available on competitive terms.

On the basis of all the foregoing findings and evidence, it is the opinion of *amici* that the decree has been and is continuing to be an effective and satisfactory force toward creating substantially more competitive conditions in the shoe machinery industry in accordance with its intendment. The removal of pre-existing unlawful barriers to entry and competitive growth having been removed, United's market position has declined sharply and pre-existing and new competition has substantially enlarged the alternatives to shoe manufacturers in sectors where demand is greatest.

To be sure, United is the most important single factor in the shoe machinery industry. In fact, it is for this reason, among others, that *amici* urged the district court to retain the decree in its present form in order that it would fully exercise its effect. There are, however, reasons wholly unrelated to any substantive or remedial theory of monopolization why the decree has not produced a complete atomization of the shoe machinery industry. The growth of the shoe manufacturing industry during the past decade has been steady, but has in the aggregate not even kept pace with the increase

in national population (*Amici* Ex. 3, admitted Tr. 598). Since the district court's decision in the monopolization case, the number of shoe manufacturers declined from 1,492 to 785 (110 F. Supp. at 301; *Amici* Ex. 4, admitted Tr. 598) and the number of establishments has declined from 1,292 to 1,041 (*Amici* Ex. 4, admitted Tr. 598). Looming over this market, moreover, is the dramatic absorption of consumer demand by foreign competition and the increasing public acceptance of rubber-type footwear which has not historically been made in "conventional" shoe factories (*Amici* Ex. 1, 2, admitted Tr. 598). A market of this nature is not likely to generate enthusiastic entry or expansion across the whole spectrum of the supplier market.

As the district court found, United is without significant competition in certain sectors of the shoe machinery market (266 F. Supp. at 333, JS App. 35). The district court also found, however, that in virtually every one of these operations, the annual movement is less than 6 machines per year (*Id.*). Markets offering such limited shoe factory demand could hardly be expected to constitute a potent magnet to new competition (A. 47-48).

Finally, a massive alienation of machines formerly on lease from United has taken place since entry of the decree as shoe manufacturers exercised their option to purchase machines formerly on "Form A" lease. By February, 1964, 53,311 machines had been acquired by shoe manufacturers on such conversion purchases, of which fully 20,253 had been acquired during the first year of the decree (D. Ex. 23, admitted Tr. 846). The initial impact of this massive conversion was to instill in shoe manufacturers an ownership interest with

which they would be reluctant to part until their capital investment had been at least partially realized. It is fair to observe that conversion sales may have retarded the erosive impulse of the decree by three and possibly as much as five years.

On the other hand, *amici* see a sound basis for predicting that the decree, if allowed to continue in its present form, will have an even more salutary impact on the shoe machinery market than during the first decade of its operations. There has been a steady decline, noted by the district court, in the importance of "conventional" footwear made with machinery "where United offered over 90 percent of the machine types" (266 F. Supp. at 333, JS App. A 34). The proportion of shoes made by the McKay, Nail, Turn, Goodyear Welt, Stitchdown, Prewelt and Lockstitch processes declined from 55 percent of the leather and leather-type footwear market in 1950 to 42 percent in 1955 to 33 1/3 percent in 1963. (*Id.*). Simultaneously, shoe factory demand, as demonstrated by the testimony of shoe manufacturers (D. Ex. 24-44, Tr. 609) has been increasingly attached to simpler footwear constructions calling for machinery in sectors where United's market position is weakest. Excerpts of this testimony are reproduced as Appendix B to the brief. These excerpts describe some of the changes which are taking place in shoe manufacturing which have attracted substantial competition by companies other than United. They also portray imporant innovations in machinery for sole attaching, side lasting, toe lasting and other shoe factory operations which have been produced by United's competitors. In many instances these manufacturers have replaced or passed over United ma-

chinery in order to utilize competing machines. There is every reason to believe that these trends will continue to undermine United's market position so long as the decree continues to liberate the market from pre-existing unlawful barriers.

The government's emphasis on the absolute and relative size of United (Govt. br. 8, 27), in the opinion of *amici*, sheds no light on the effectiveness of the decree in dispersing the result of unlawful monopolization in the shoe machinery field. As the government recognizes, mere size is no offense. *United States* v. *Swift & Co.*, 286 U.S. 106, 116. Nor has the government pointed to any record evidence indicating that size in this case has been abused; rather, the government has virtually conceded United's compliance with the decree (Tr. 561, 562, 584).

In the same vein, the government's reliance on *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, is misplaced. Apart from the fact that standards under the Clayton Act are wholly different from Sherman Act standards, one of the factors which led to enactment of the Celler-Kefauver amendments, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), *Procter & Gamble* arose on entirely different economic circumstances. The concern there was essentially twofold: (1) the elimination of the most likely potential competitor in a concentrated market; and (2) the possible elevation of entry barriers through intrusion by merger of a firm with a history of engaging in substantial advertising in a homogeneous product market already characterized by significant advertising-induced product differentiation, 386 U.S. 568, 579-581. We sub-

mit that unrelated legal principles and economic conditions cannot usefully be imported into this case.[16]

III. Imposing Structural Reorganization Through Dissolution or Divestiture Could Seriously Impair Economic Conditions in the Shoe Manufacturing Industry Without Promoting More Competition in the Shoe Machinery Industry.

While recognizing that the record affords no basis for exploring paths of divestiture[17] (Govt. br. 47, 48) the government claims that a presumptive case for surgical relief has been made (Govt. br. 48, 49, 50, n. 24) and undertakes "to 'tentatively suggest rather than specifically demand definite and precise remedies'" (Govt. br. 48). Of course, one of the principal reasons for *amici's* active participation in this proceeding is their awareness that from C Day forward, the ultimate objective of the government has been to effect a structural reorganization of United. The only record proposal by the government is its C Day petition to require the establishment of a full-line domestic shoe machinery firm out of the present assets of United. Evidently amending its theory, the government in this court for the first time "tentatively suggests" a variety of possibilities such as sale of unidentified shoe machinery assets to another company (presumably a stranger to the shoe machinery industry), establishment by United

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[16] This principle is demonstrated by the fact that a majority of the Federal Trade Commission are of the opinion that Procter applies to acquisitions in a market of the very nature the government would hope to establish by this proceeding. General Foods Corp., 3 Trade Reg. Rep. ¶17465 (FTC 1966).

[17] Consistent with sound judicial administration, the district court's pre-trial order required proof as to the need, or lack of need, for modification prior to committing its time to hearing detailed evidence on divestiture or dissolution programs.

of an independent shoe machinery company through transfer of assets and personnel, and spin-off of a foreign subsidiary. The government does not claim to have examined the probable consequences of any of these programs but has merely offered a glimpse of diverse possibilities.

Nevertheless, the relief sought by the government in this Court would irreversibly set in motion procedures whose natural and possibly inevitable outcome would be the ultimate dismemberment of United. As a consequence, whereas it would be clearly inappropriate to comment in detail on each of the broad programs tentatively suggested by the government, we believe it entirely appropriate, since the government has opened the subject, to express the concern of *amici* with the dangers inherent in surgical relief. We are aware that much of this analysis is in the nature of opinion and may be subject to the criticism that these are the sort of subjects which should be pursued on the basis of a complete record. Our suggested reasons for opposing divestiture are, however, submitted in the same spirit as the government's tentative suggestions as to approaches which might be explored.

We respectfully submit that the observations of *amici*, representing virtually all the shoe machinery customers of United, are entitled to some weight. The government itself concedes that divestiture should not be imposed at the cost of, "... working an undue hardship upon the American shoe manufacturing industry, which would be an important beneficiary of the effective functioning of the shoe machinery market" (Govt. br. 49). In like vien, the district court described the shoe industry as "among the chief intended beneficiaries of this Court's decree" (266 F. Supp. 335, JS App. A

38).[18] Concededly, the antitrust laws are designed to protect competition, not competitors or customers. *United States* v. *General Dynamics Corp.*, 258 F. Supp. 36, 66 (S.D.N.Y. 1966). Nevertheless, in this instance, against the backdrop of the government's proposed remedy, the enhancement of competition and of economic opportunities of customers is to a great degree synonymous.

At the threshold, it is the view of *amici* that surgical relief is unwarranted because the decree is operating to produce a smooth transition of the market toward effective competition (II, *supra*). The dispersal of unlawful market power and the ventilation of the market to new entries and successful growth of smaller firms are taking place. Inasmuch as the decree is having this effect, as was envisioned in 1953, there is no basis for taking the irreversible step involved in dissolution or divestiture. Contrary to the government's argument, we see no *prima facie* case for divestiture but rather see a presumption favoring the decree in its present form. There is no more basis now than there was ten years ago for hastily or imprudently ordering divestiture.

The government's original theory as to remedy, stated in its C Day petition, asked for the division of United into two full-line shoe machinery companies. This form of divestiture is essentially the same as sought by the government after trial of the main case, differing only in that the government then asked for the establishment of three such firms (110 F. Supp. at 348). Among

[18] See also Kaysen & Turner, at 80, n. 40 as to the attention to be awarded customers and others immediately affected by proposed plans of divestiture.

other reasons, the district court declined to grant the relief requested because of the impracticality presented by United's conduct of all its domestic shoe machinery manufacturing activities in a single plant at Beverly, Massachusetts (*Id.*). This condition persists today, and the same broad questions as to the practical transferability of assets and personnel and, more important, as to whether two viable companies could result from such a transfer are as pertinent today as they were a decade ago.

Professor Carl Kaysen has described some of the dangers involved in attempting division of the Beverly establishment. These included the practical impossibility of transferring United's factory assets and trained labor force, resulting in the likelihood of wasteful underutilization of capacity at one location and inadequacy of facilities elsewhere sufficient to constitute an independent competitive force.[19] There is certainly no guarantee that any individuals, seeing the split-up of the enterprise, could be induced to remain with either surviving firm. Professor Kaysen also observed that joint utilization of management, labor and research during any interim period, even if feasible, would hardly be calculated to create a climate conducive to independent competition for the future.[20] *Amici* foresee in any such sharp reorganization of United an equally sharp disruption in the stable flow of shoe machinery, a potential loss of innovation and a general decline in efficiency levels presently available.[21] These

[19] Kaysen, at 273.

[20] *Id.* at 273, 274.

[21] See Kaysen and Turner, at 80: "... the size of existing plants sets a lower limit to any dissolution proposal, even when they are bigger than the size needed to achieve minimum costs."

serious practical impediments to divestiture should not be masked by the suggestion that it would be any more feasible or efficient to "sell" United's assets (including personnel) to an independent company or to a subsidiary which is not engaged in the production of shoe machines. It would still be necessary to create a shoe machinery manufacturer out of whole cloth, regardless of the inter- or intra-corporate device to be utilized. In short, the wisdom of Solomon is no more required now than a decade ago to perceive the economic disadvantages of this remedy.

Even if the physical grounds for not requiring divestiture were absent, the *amici* believe that this form of relief would be disadvantageous for the shoe industry. United has historically provided the shoe industry with valuable research and development for innovation in shoe machinery and resulting improvement in technology in shoe manufacturing.[22] In making this statement, we recognize the inherent difficulties in quantifying appropriate measures of affective innovation, but to reiterate, we are only adverting to the problems we foresee should the government prevail on this appeal. In those sectors of the approximately 187 shoe factory operations (266 F. Supp. at 333, JS App. A 35) where demand has been most active in recent years, substantial benefits have accrued to the shoe industry from the research and development of other machinery manufacturers. These developments are illustrated by the testimony of shoe manufacturers set forth in Appendix B. At the same time, however, the nature of United's shoe machinery business permits it

[22] See Kaysen, at 150 as to scale of United's research activity at the time of the main case. See also 110 F. Supp. at 329, 332; 266 F. Supp. at 334, JS App. A 36.

to undertake research and development efforts over the entire spectrum of machinery demand and to apply its technological know-how to sectors which are not attractive, because of the paucity of transactions, to its competition.

United has already demonstrated a marked tendency to diversify into lines of endeavor unrelated to shoe machinery. During the decree period its annual revenues from the domestic sale and lease of shoe machinery declined from $32 million to $24 million while its corporate revenues increased to $208.7 million in 1964 (Govt. br. 9). Evidently the relatively low rate of return in the shoe machinery industry (266 F. Supp. at 334, JS App. A 37) and the relatively slow growth of the domestic shoe manufacturing industry have increasingly led United to look elsewhere. *Amici* are concerned that any form of divestiture would make the shoe machinery business less attractive, accelerate the trend toward other lines and significantly diminish the extent to which United would in the future invest in research and development dedicated to shoe machinery. The impact of such a development could be especially disadvantageous to the shoe industry which is a relatively unconcentrated (*Amici* Ex. 4, admitted Tr. 598), essentially small business industry (266 F. Supp. at 332, JS App. A 32).

The nature of the shoe machinery market also indicates that dismemberment could create diminished effective competition in the shoe machinery industry There is evidence indicating that competition between two or more companies competing across the full machinery line could severely impair and even destroy the competitive opportunities for progressive, limited line

companies (A. 70-71). The extent to which these firms have pioneered certain significant shoe machinery developments is borne out by the testimony of shoe manufacturers presented to the district court (App. B, *infra*, D. Ex. 24-44, admitted Tr. 609). The entry and growth of competing shoe machinery manufacturers in market sectors of greatest shoe factory demand have been among the most significant developments under the decree. The elimination of unlawful entry barriers has created a market condition whereby 56 companies have entered the shoe machinery industry during the period of the decree and the rate of entry has steadily increased (266 F. Supp. at 332, JS App. A 33). Similarly, pre-existing smaller competitors of United have flourished during the same period (266 F. Supp. at 331, JS App. A 31). The increase in numbers of competitors and the growth of small firms which have taken place in the shoe machinery industry in the face of the limited growth of the shoe manufacturing industry and the sluggish demand for numerous machine types reflect the truly unique present character of the shoe machinery industry. Shoe manufacturers have greatly benefitted by the substantial enlargement of "... multiple centers of activity, each following its unique pattern and developing its own esprit de corps to respond to the challenge of competition" (110 F. Supp. at 347). The proliferation and growth of small firms that have taken place under the decree are, moreover, exemplary of the desirable market condition which this Court has stated to be a central purpose of the antitrust laws. *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 275-277. The shoe industry and, we submit, competition generally, would be ill-served by the elimination of competitive opportunities for the many limited line companies.

Finally, fully one-third of machine types involve an annual demand of less than six machines per year (A. 47). As the district court observed, United's broad line permits it profitably to supply machines for which there is small annual demand (266 F. Supp. at 334, JS App. A 37). The shoe manufacturing industry is concerned that any dismemberment of United would jeopardize stability of supply in these markets and impair the leasing opportunity.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

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APPENDIX A

Excerpts from Affidavits of Executives of Shoe Manufacturing Companies Regarding Increasing Competition in the Shoe Machinery Industry Since Entry of the Decree.

James Forma, President of Lawrence Maid Footwear:

5. Under the conditions created by the decree I consider that I am in a position to choose just what shoe machinery I want for my varying techniques of manufacture and I try to pick the cream of the machines. My present inventory includes United machines, Lamac, Schwabe, International, Lauretti, Allied, Young wood heel nailers, and other types. I always look to see what machines will do for me rather than what they will cost as a matter of dollars, because my emphasis is on production. I feel that competition in shoe machinery exists in a full degree and that I have no difficulty in picking the kind of machines I want. (D. Ex. 24, admitted Tr. 609)

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Francis H. Gleason, President of J.F. McElwain Company, a division of Melville Shoe Corporation:

7. Our company received at the time a copy of the Court's decree entered against United Shoe Machinery Corporation, and it appears to me that United has fully lived up to this decree. There now exists in the shoe machinery market full and free competition allowing us as manufacturers to select our machinery as we wish on the merits of the machines available and in accordance with the processes we select to meet the various style changes which are constantly imposed on us by the market. (D. Ex. 25, admitted Tr. 609)

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John R. DeWitt, Vice President for Manufacturing of J. F. McElwain Company, a division of Melville Shoe Corporation:

2. My job as Vice President for Manufacturing since 1959 and to a subordinate degree previously as Assistant to the Vice President was to O.K. the machinery to be adopted in the second stage after the financial appraisal had been made by Mr. Francis H. Gleason and other executives. In the selection of machinery I had to stay close to the style program set by the buyers for the Melville stores. I was assisted by the Product Development and Industrial Engineering Departments in evaluating different shoe machines for the requisite process. My method was to choose the type of manufacture on the basis of the style called for by the buyers and then to tell my purchasing agent, David Spofford, what general types of machines were needed for the process adopted. Mr. Spofford would then use his extensive knowledge acquired through visiting shoe machinery shows, reading catalogs and trade papers, and interviews with suppliers, to request trials of several different competitive makes for the operation in question. Frequently there would be two or three trials in our factory at the same time. The machines finally selected would be chosen on the basis of cost, efficiency and suitability for our purposes in every respect.

We like to conserve our money to buy the Fortunas, Schwabe and other machines which are not available for lease. We have used our cash, for example, to buy Jupiter stitchers in 1960 when we spent $130,000 for theses machines after comparing them on a cost evaluation basis against the United's OSA machines.

6. The result of the United Shoe Machinery decree (1953), so far as I can see, has been to render competition perfectly free and open and to give us an increasingly wide selection of machinery for our develop-

ing processes. In particular, the rise of the cement process in the men's shoe field and introduction of the lighter and simpler cement machinery in which United did not pioneer has brought forward other companies on a level with United, able to compete and manufacture machines on equal footing with United. (D. Ex. 26, admitted Tr. 609)

* * *

Rudolph (Rolf) Bieringer, Plant Manager of Ludington Footwear Co. (a subsidiary of LaMarquise Footwear, Inc.):

6. Since the United Shoe decree in 1953 I have observed more competition among shoe machinery suppliers. This came from International Shoe Machine, Bata, Compo, Schwabe, Industrial Shoe Machinery Co., Lewiston Shoe Machine Co., and from foreign machines (e.g. the Moenus heel seat laster distributed by Compo) as well as from United. United also appears to have developed more machines faster in recent years. The Ludington factory now does much more machine work than used to be done under former manufacturing processes. (D. Ex. 29, admitted Tr. 609)

* * *

Milton M. Isenberg, President of Continental Shoe Corporation, a division of Consolidated National Shoe Corporation:

4. Since the decree in the United Shoe Machinery case I have found ample competition among machinery suppliers. When I first came to Continental we were 100% on Goodyear welt with all United machinery. The four-year transition into cements was made with United machinery, but I found the Kamborian thermalaster cheaper and more efficient than the staple laster. The bulk of our business is low-heel shoes between 4/8's and 6/8's and we make no heels higher than

14/8's. As we transferred to cement manufacture, having begun with United machines, I got in United's LMA and later the TLA, but I found both unsatisfactory for our methods because with these machines I could not control our shoemaking. Among United machines I had only the #6 left for toe lasting and it is used for repairing. I therefore transferred to the International (Kamborian) toe lasters which did an adequate job for our kind of manufacture.

In general, for our kind of manufacture I found that United was too slow as regards machines or the cement process, and that its competitors got in first. For example, I had to go to Compo for roughers. I brought in some United sole presses, but later I replaced them with two Schwabe presses, which I purchased and which were the hydraulic two-station type.

In fact, today when I look for machines I shop around much more than I ever did and I look for other machines besides United. For example, recently I have taken on a Young wood heel nailer. According to my observation United has complied with the decree in every respect and I feel that machinery competition now exists in the full sense satisfactory to the shoe manufacturers. (D. Ex. 30, admitted Tr. 609)

* * *

Richard P. Curtis, Vice President and Secretary of Curtis-Stephens-Embry Co.:

Certainly, as compared with 10 years ago, there is substantial competition in shoe machinery. This can readily be seen at shoe machinery shows, which we attend for the purpose of keeping abreast of developments. In addition to the domestic shoe machinery manufacturers, there is available a large and growing number of shoe mchines made in Europe. (D. Ex. 31, admitted Tr. 609)

* * *

Milton Carmel, partner in Sham-O-Kin Shoe Company:

I am convinced that this market has changed radically from when I first entered the shoe industry. Neither we nor any shoe manufacturer are dependent upon United Shoe Machinery Corporation. There is plenty of competition in the shoe machinery business. Salesmen for competing concerns—both new and second-hand—visit us and solicit our business constantly. I have in my own factory machinery made by as diverse manufacturers as Schwabe, International, Allied, Ludlow, Circle, Western Supplies, Boston Machine Works, Markem, Industrial Shoe Machinery Corp., Union Lockstitch Co., Bata, and others. I use machines of different manufacture, side by side, for the same operations. For example, our pulling-over is done on both Schwabe and United machines; similarly, our clicking (die cutting) is done by United, Bata, and Schwabe machines.

I use heel nailers obtained from a competitor of United for considerably less than the price United charges. Generally, a great many of United's prices for its machinery are higher than the prices charged by its competitors for a mahcine which will do the same job. Accordingly, I often buy the competitor's machines. While United's prices are high in that respect, its machines are also designed for greater flexibility (to accomplish more variation in their function) and are designed for long life. In these respects they are clearly superior machines; but for my use many of these attributes are unnecessary and I buy a more economical machine. (D. Ex. 32, admitted Tr. 609)

* * *

Abraham B. Rubin, Vice President of Muskin Shoe Co.:

6. There is no question that more machinery manufacturers have come into the picture during the last

ten years. As sources for machinery now, we have United, Compo, Ralph's Schwabe, International Shoe Machine Corp., Independent Shoe Machinery Corp., Industrial Shoe Machinery Corp., Circle Machine Co. (of Haverhill), Ludlow and others. We consider machinery from all such sources when making new acquisitions.

For example, in March or April of this year we were interested in acquiring some toe lasting machines. We had had experience with the International (Kamborian) toe lasters in the past. Nevertheless, we traveled to Boston to inspect the United toe lasters, considered the Astra toe laster and looked at one in operation at the Miller-Hess factory (these two machines were a combination pulling over and toe-lasting type recently available); we also considered the Schoen toe laster offered by Herman Schwabe Inc.; and ultimately decided to purchase the machine manufactured by International Shoe Machinery Corp. The incident illustrates the need for alertness to new developments in the industry, such as "combination" lasting.

7. When we are unfamiliar or undecided with respect to new machinery, we are apt to test it in the factory. We have twice tried nailing machines manufactured by Herman Schwabe, Inc., and ultimately bought from United an equivalent machine at four times the price, because of its superior performance. Currently, we employ Compo presses, Compo roughers, Compo bottom cementers, and Compo sole cementing machines. We also utilize a good deal of United machinery. In our experience, it is quite common for one manufacturer to have one superior product in a given line, and we then buy that machine for its particular job. In addition, the question of timing is sometimes important. For example, when International developed its toe laster before United did so, we obtained the International

model and became accustomed to it. When United marketed its model, we had no interest in changing over.

We prefer the Circle automatic edge trimmer to the model marketed by United, and we use the Circle machine. (D. Ex. 34, admitted Tr. 609)

* * *

Samuel L. Slosberg, Chairman of the Board of The Green Shoe Manuafacturing Company:

7. With its high and continuous production volume, the Company has always tried to keep closely in touch with development of improved and new machines. This has been particularly true in the last decade. We have tried to keep in touch with the machinery manufacturers throughout the world. We have usually sent representatives to all world industry fairs and shows where new processes and operations and improved and new machines are displayed. It has been our policy to try to learn everything that is presently available and all advances under development which may soon be introduced. We have over the years had particular opportunities in this regard because our high and diversified production has led to frequent use of our factory for test purposes by machinery manufacturers and distributors. Thus we standardized on Bata clickers before the decree was entered in the United litigation, and similarly on edge trimmers and heel shavers manufactured by the British Hawkes concern and distributed by Harris of Lynn.

The Company has also bought new machines from United and from other manufacturers, including Bata, Compo, Diamond, Industrial, International and Schwabe of the domestic group, Hawkes of England, Pederson of Denmark and Spang & Brand of Germany, acquired from distributors in this country. Regard-

ing new United machine types, it has been and is the Company's policy to lease at first to acquire experience as to performance and cost and then either to buy or return the machine in accordance with the Form B lease provisions. The Company's machines, other than dry-thread sewing machines, now total 1159, of which 571 are of United manufacture, 85 Bata, 82 Compo, 46 Hawkes, 29 Freeman, 7 W. J. Young and 339 others. 17 of the 571 machines of United manufacture are leased from United. (D. Ex. 36, admitted Tr. 609)

* * *

Samuel Wolff, President of Wolff Shoe Manufacturing Company:

The big change I have seen in the last ten years is the growth of new competition in shoe machinery, and the greater number of new types of machines which are offered. Some of these, after trial, work out to be advantageous to us; some of them don't. There are so many new developments that it has become an expense to try them out. The shoe industry has also been affected by the profusion of style ideas brought back from buyers' visits to Europe (particularly Italy) which have led manufacturers to produce many more models of shoes each season.

We have Compo sole-laying machines in all our factories, and buy them on five-year terms. If it turns out to be desirable, I can turn a machine, not yet fully paid for, back to Compo for credit on a newer machine if one comes out. I buy United machinery if I can expect it to pay for itself in three years; but if the machine investment is large, I renew the lease.

After looking at a United heat-setting machine, I decided to install instead one which is made in England. I purchased it, and now have them installed in all our factories.

I returned our United bed machines and replaced them with Industrial Shoe Machinery Co. toe lasters. These machines will have paid for themselves in five years, and I will own them outright. We have attached a cylindrical device obtained elsewhere to a Naumkeag buffer which I had purchased under the discount Plan; it works well. I buy some machinery from Western Supplies Company, and work with them in making improvements. I find ample competition among machinery manufacturers, and I am able to be flexible and selective in acquiring machinery. (D. Ex. 37, admitted Tr. 609)

* * *

T. R. Volenetz, director of manufacturing of Brown Shoe Company:

I am familiar with the kinds and makes of shoe machinery, both as an actual operator and as an executive. It is essential to be constantly alert for better methods of production and better machinery and I have visited the National Manufacturers Association shoe machinery shows in Cincinnati, and Atlantic City, have made trips abroad, have visited other manufacturers' plants to see machinery in operation, and have brought in machines for trial and comparison with machines already performing work in our factories.

We have a lower percentage of United machines in our factories than at the time of the decree, as a result of the International machines, thermolaster and toelasters, Compo toelasters, competitive clicking machines and other machines which were not available in earlier times. The shoe machinery market is strongly competitive. There are now three makes of toelasters approximately equal in productivity, cost and quality (Compo, United, and International); and similar choices are available with respect to other machinery. There are also many more different types of machines

now available than in 1955. In addition, there is a variety of European machinery available in this country, even for the welt process. It is hard to think of any particular United machine for which you cannot now obtain an adequate substitute. (D. Ex. 38, admitted Tr. 609)

* * *

Edward J. Riley, Jr., Vice President and member of Board of Directors of International Shoe Company:

International has many types of machines distributed by manufacturers which are competitors of United. Examples are: SAS skivers, Shcwabe sole presses and wood heel attaching machines, Compo ruffing and toe lasting machines, Astra combination lasting machines, Hawkes heel trimmers, Desma vulcanizers, International Shoe Machinery side and toe lasters, Prime rib attachers, Young nailers, etc. In addition, International uses machinery made in Europe including the following brands: Ralph's, Bata and Pedersen (whose Jupiter stitchers were used exclusively during the past three years in one factory, until August 1964 when they were replaced with a better machine distributed by United). There is more activity in the European machinery market than there was ten years ago.

There appears to be more competition in the shoe machinery market than there was ten years ago and, in my opinion, this condition is healthy. In part, this increased competition has resulted from changes in process previously described and, in part, from developmental break-throughs, such as the Astra combination laster which is less expensive than anything previously available. Such changes and developments have, in turn, stimulated more competitive efforts by others. United, Plymouth, International Shoe Machinery, Southern Machinery, Compo and other machinery sources all compete vigorously. The percent-

age of United's machines in International's factories has decreased from what it was ten years ago, and the rentals and royalties paid by International to United have also decreased. (D. Ex. 39, admitted Tr. 609)

* * *

Robert S. Lockridge, President of Craddock-Terry Shoe Corp.:

8. Regarding new methods and machines, certain of my associates and I keep in close touch with available machines and developments. I am in contact with many other shoe manufacturers and visit many shoe plants. I have never found the slightest hesitation on the part of other manufacturers to show me their factories and operations and this interchange of information as to technology and equipment is continuing. A member of our staff devotes full time to machinery matters and like myself is at all times in touch with other factories. We attend the Factory Management Conferences and other technical and machinery exhibitions and are always in contact with suppliers' representatives. We maintain familiarity with the equipment available or under development for the different operations. We particularly try to be aware of all technological advances, new operations and new machine types. We are also continually in touch with the second-hand machine markets.

9. Whenever we consider taking on a new machine type, we hold competitive trials of all machines available for the purpose. The machines and the results of the trials are studied by our machinery expert, the head of our rate setting department, and the head of our production. They make a recommendation to me as between the competing machines and I make the ultimate decision. Through such competitive trials and this process, we have bought or leased Cox & Wright

heat setters, Jupiter outsole stitchers, International and United toe lasters, Lamac presses for sole laying, Astra pulling over and toe lasting machines and other types.

11. We have in use in our factories machines manufactured by 23 different companies in addition to our United machine. In number these machines aggregate 446, of which 163 are leased and 283 owned. We have 19 Compo machines, 40 International, 10 Lamac, 10 Schwabe, 15 Young, 72 Freeman, 2 Astra, 2 Cox & Wright, 61 Boston Machine Works and varying quantities manufactured by others. For our women's Littleway shoes we last shanks with the United staple side laster, foreparts with International machines and toes with both International and United toe lasters, of which we have 25 and 20, respectively; and soles are attached with United sole attaching machines. On our cement shoes we use International side lasters exclusively for shanks and foreparts on all heel-heights up to 10/8's and on the higher-heel shoes the United staple side laster for shanks, International machines for foreparts; for toes, both International and United toe lasters; and for sole attaching Compo, Schwabe and United machines, of which we have 1, 10 and 17, respectively. We also use 2 Astra pulling over and toe lasting machines and 2 Cox & Wright heat setters on this production. On Goodyear welt production we use Prime Manufacturing Company's insole machinery, 8 Jupiter stitchers for our outsole stitching, and 10 Lamac presses for sole laying before outsole stitching. (D. Ex. 40, admitted Tr. 609)

* * *

Julian Samuels, President of Samuel Shoe Co.:

Excluding dry-thread machinery and including clickers, I would say that in the area of 65% of our ma-

chinery was manufactured by United Shoe Machinery corporation, and that we own about half of them. Most of this owned machinery was purchased under the discount Plan, after the decree. Sometimes we purchase new machines from United; sometimes we lease them. We also obtain machinery from other sources such as Compo, Dania, and Schwabe.

There is definitely more competition in shoe machinery than there was ten years ago. The European influence (Albeko, Ghini, etc.) and the Pirmasens Shows have stimulated domestic manufacturers. This can be seen at the Atlantic City Shoe Machinery Show, at foreign shows, in trade publications, advertising circulars, and elsewhere. (D. Ex. 41, admitted Tr. 609)

* * *

Abraham Weinman, President of Five Star Footwear Company:

There is no question that the number of shoe machinery sources has increased over the past ten years, and that our acquisition of machinery are made from more of these sources, including the second-hand market.

Competition among shoe machinery manufacturers is vigorous, and new developments in shoemaking come rapidly. (D. Ex. 44, admitted Tr. 609)

APPENDIX B

Excerpts from Affidavits of Executives of Shoe Manufacturing Companies Regarding Competition Among Shoe Machinery Companies in the Supply of Machines Adapted to New Shoe-Making Processes.

James Forma, President of Lawrence Maid Footwear:

> Since coming to Lawrence I have broken up my conveyor lines, because the new machines introduced with the new cement techniques have enabled me to combine operations. I can foresee a development in shoe manufacture which will render obsolete United's insole tackers, assemblers, and heel seat lasters. In fact, my Lauretti heel molder is doing that just now. As a result of the speed-up and flexibility in manufacture, my factory now plans to give four-week delivery and depends upon re-orders for its continued business. (D. Ex. 24, admitted Tr. 609)

* * *

John R. DeWitt, Vice President for Manufacturing of J. F. McElwain Company, a division of Melville Shoe Corporation:

> 3. The changes and developments in the McElwain manufacturing process described in Mr. Gleason's affidavit sworn to September 4th 1964 have of course required frequent changes in our machinery inventory, and changes have also been required by the constant changes of style that are going on at all times. In general, we have found that the cement process for men's shoes has not been as fully developed by United's production of machines as it has for women's shoes, which was the larger field and therefore received first attention from United. The cement-attaching and -lasting machines are generally less complicated than the welt machines we have been using in the past. What has rendered the cement process possible for

male footwear is the technological improvement in cements in the last ten or twenty years; with the development of neoprene and hot melt cements, the new processes and newer, lighter machines have been brought into service for us as well as other manufacturers.

The machinery development outside of United Shoe Machinery Corporation has been in the direction of this simpler type of machine which has been produced by International, Compo, Allied, Schwabe, Lewiston Machinery Company, Independent Shoe Machinery Company and others. I am fully convinced that future development in our men's and boys' shoes must be in the direction of improved cement process shoes. The drive on the part of other manufacturers as well as ourselves is toward the simpler processes tending toward increased automation. This is largely caused by the necessity of economizing on labor cost, by cutting down the skill required, which is a factor in shortening the training cycle through simpler machines. In our manufacture the cost of labor is approximately 30% of the total cost of shoe production.

4. The greatest impact of the developing cement process on shoe machinery has been in the lasting and bottoming field through the combination of operations so as to reduce the number. For example, as to United machines the cement process has tended to push out of our factories the Rex pulling over machine, the inseaming machine, the outsole stitching machine, the levelling machine, and staple side-lasters. We no longer need, or need to a much less degree, machines for heel burnishing, and edge setting. In fact, we have in some of our manufacture no heeling at all. (D. Ex. 26, admitted Tr. 609)

* * * *

George M. Haddad, President Quaker Shoe Corporation:

> Tennis and leather vulcanized shoes, comprising approximately one-third of our total production, are made on Desma (German) vulcanizing machines which we purchased from International Vulcanizing Corporation for around $200,000. This vulcanizing is a new process, which I first heard of about four years ago. United has no equivalent machine for it. We started using the process around 1962. Its method of manufacture is still fairly tricky, being dependent upon absence of fats from the leather, accuracy of heat control in the machine, and similar technical difficulties. It is new and still needs working out in technical details. (D. Ex. 27, admitted Tr. 609)

* * *

John S. Zulick, Treasurer of J. S. Zulick Co.:

> Our problem has been to some extent that the machinery developments during the last five years (both from United and from others) have tended to be in cement process machines useful for high volume production and not adaptable for our factory purposes. There is ample competition in the shoe machinery line, and I can understand, in view of the high volume production of cement shoes, that shoe machinery manufacturers concentrate their development efforts and resources in that area. (D. Ex. 28, admitted Tr. 609)

* * *

Richard P. Curtis, Vice President and Secretary of Curtis-Stephens-Embry Co.:

> 4. Substantially all of the machinery we use for our welt shoes is made by United Shoe Machinery Corporation. Exceptions are the Hawke edge trimmer, Freeman tack puller, and Prime insole machine. I would

say perhaps 95% of our welt process machinery is United.

On the cement side of our production, the proportion of United machines would be almost reversed. Very few United machines are employed there. Our production of this type of shoe has increased markedly in the past three or four years, and our success with the "Miss Pappagallo" shoes (which are also cements) has encouraged us to use cements more in our other shoes as well. This is in response to market acceptance and demand.

On cement shoes, we use only three types of United machines: pulling-over, assembling and heel seat lasting machines. We use machinery manufactured by International Shoe Machine Corporation for toe lasting and for side lasting. We use machines manufactured by Compo Shoe Machinery Company for bottoming, sole attaching, and auxiliary operations. We once used United bed lasting machines in that connection, (and bought them at discount when they became available under the Plan for Terminating Form A Leases) but now no longer employ them for major lasting operations. We still own and occasionally use the United machine on shoes with straight counters, as a sort of auxiliary machine, but have replaced the United with the Kamborian (International) machines for our major side lasting and toe lasting.

We replaced the United with Kamborian side lasting machines some twelve or fifteen years ago, when we started making the flat-lasted shoes for which the Kamborian machine was well adapted. We replaced the United with International toe lasting machines a few years ago when International improved them with thermoplastic cement and Teflon wiping pads. (D. Ex. 31, admitted Tr. 609)

* * *

Milton Carmel, partner in Sham-O-Kin Shoe Company:

> In this preference, I also consider the chance that a new process in shoemaking may change the type of machine I want to use. In the past ten years, I have seen two striking occasions of this. First, when the Amalfi contruction grew to a peak recently, it made necessary a roughing operation which utilized a machine that United does not manufacture. We perform that operation on Ludlow roughers. Thus the Ludlow Company has come in and filled a need when it arose, and so obtained that business.
>
> The second such example occurred about three years ago when various companies offered combination pulling over-toe lasting machines. This new combination of two older operations was satisfactorily done for us by a machine offered by Herman Schwabe Inc. We tried the United and competitive machines for this purpose, but found that the United machine did not work as efficiently or economically in our factory upon the double linings we use. The Schwabe machine worked more satisfactorily, its price was economical for us, and so we purchased and have used that machine. (D. Ex. 32, admitted Tr. 609)

* * *

Harvey C. Steffy, President and Treasurer of Steffy Shoe Co.:

> Our equipment was very simple when we started in operation. We had a United clicker, a United lasting machine, a few hand machines and home made items, and later on a stitching machine. We have grown to have a great many more machines, including machines made by United, Schwabe, and others. I change machines from time to time as the models alter and improve.

For example, I changed from United to a Schwabe Heel Seat Laster in 1962 or 1963. I tested the new United Model F, but found I had trouble nailing the small shoes our factory makes. I tried the Schwabe machine and bought it. I am still looking for something better, but I feel the Schwabe machine is the best available at present. In my experience, it is hard to find machinery (of whatever manufacture) which is well adapted to making the little shoes worn by infants. (D. Ex. 33, admitted Tr. 609)

* * *

Abraham B. Rubin, Vice President of Muskin Shoe Co.:

4. This transition has had an effect upon the types of machinery which we use. For example, we no longer have left a single stitching machine (except for some ORL's which we use for moccasin stitching) although such machines were a necessity for our earlier methods of production. We have returned to United their heeling equipment, lasting machinery, and others. Due to the changes in shoe construction, we have no further use for their machines of these types. (D. Ex. 34, admitted Tr. 609)

* * *

Harold Goldberg, Chairman of the Board of Evangeline Shoe Co.:

6. As to lasting, from 1951 on we tack-lasted the heel seats, staple-lasted the shanks and cement-lasted the foreparts and toes. For the foreparts we started with latex cement and used at various times hand-lasting, the hexagonal roll-lasting, the United forepart laster, and the International Model C laster. In 1963 we stabilized this part of the process by taking in International's Thermalasters for forepart-lasting with thermoplastic cement. This eliminated one operation. For the toes we had first used the United No. 6 ma-

chine with pyroxylin and upstanding tacks which gave us a production of 300 pairs per day per operator. When open toes went out and were replaced by closed toes about 1955, we began to use United's TLA-D with pre-applied latex after trimming out on a box toe and lining trimming machine. This machine and cement enabled us to increase productivity from 300 pairs per operator per day to 900 pairs. As toes became semi-pointed in 1958 and 1959 the TLA-D failed to give us the required quality and we replaced it with United's LMA, with the resin cement applicator. The result was to eliminate the latex cementing operation. About 1960 sharp toes (needles, double needles, and triple needles) came in and the LMA in turn failed to give us the needed quality. We then took on the United power toe lasters and the International power toe lasters, using thermoplastic cement with each. For the old bed machine operators we took the United toe lasters, but for other operators we took the International toe lasters because this was a simpler machine. It was easier to train operators on and we had, in the circumstances, to train operators in one plant quickly.

7. We never went to cement-lasting for shanks because we could not get the proper draft with a cement lasting machine. At that time we were making at least 50% high heels and were also using long counters. These features did not in our judgment permit the use of cement-lasting and at the same time give us the proper quality.

8. In the course of the evolution above described the United forepart cement laster, TLA-D, box toe and lining trimmer and bottom ironer were eliminated from our machine line. All the foregoing changes of process in machinery were put into effect by us in the constant endeavor to attain high quality style to meet new requirements for flexibility and shape, and at the

same time attain the utmost possible economy in view of the very sharp competition we have with other women's dress shoe manufacturers. (D. Ex. 35, admitted Tr. 609)

* * *

Samuel L. Slosberg, Chairman of the Board of The Green Shoe Manufacturing Company:

6. Historically the Company first used United's stitch-down machines, which were returned when the process was given up in the 1920's. The machines for the Goodyear welt and Silhouwelt production have been largely of United manufacture. When the Company began its flat-lasted cement production in the mid-1930's, it at first used the United fluid-bag sole attaching press. It later installed the entire line of Compo machines, including toe pounders, roughers, cementing machines and 6-station and 2-station presses, along with one United 2-station press. This is the equipment which has been continuously used for the Company's flat-lasted cement production. (D. Ex. 36, admitted Tr. 609)

* * *

T. R. Volenetz, director of manufacturing of Brown Shoe Company:

Government representatives have recently supplied us with the following list of 18 types of machines as a basis for information they are requesting:

1. Clicking
2. Eyeletting
3. Cutting Press
4. Pulling Over
5. Lasting
6. Welt Sewing
7. Inseam Trimming
8. Outsole Laying
9. Rough Rounding

10. Outsole Stitching
11. Cement Sole Attaching
12. Littleway Lockstitch
13. McKay Chainstitch
14. Loose Nailing
15. Outsole Leveling
16. Fibre Fastening
17. Heel Attaching
18. Slugging

The first five machines on that list are used fairly generally on a majority of shoes. Such of the remainder as the machines for welt sewing, inseam trimming, rough rounding, McKay chainstitch and loose nailing are adapted to dying processes, and are used less and less. The McKay chainstitch machine, for example, has not been used to any degree in the last fifteen years. We stopped doing loose-nailing (welt process) about ten years ago. No stitch-downs to speak of have been made for the last ten years.

By comparison, in 1960-1 we started using injection moulding for the manufacture of children's shoes. This process moulds the heel and sole (a PVC-poly-vinyl-chloride-bottom) on to the leather upper. This method of construction, which has grown in use in our "Robin Hood" line since that time, replaces all the machinery previously used for sole-laying, edge-trimming and heel-attaching. Where this process is used instead of the welt construction for similar shoes, it displaces every machine numbered 7-18 on the above list. (D. Ex. 38, admitted Tr. 609)

* * *

Edward J. Riley, Jr., Vice President and member of the Board of Directors of International Shoe Company:

In addition to responding to consumer demand International is interested in making shoes by cement proc-

esses for various other reasons. Such shoes are less expensive to make than welt shoes. Manufacture of shoes by cement processes requires less machinery, fewer operators and less production space. In my experience when International changes a factory from welt to cement production, it obtains a 20 percent increase in the amount of space available and comparable increase in factory productivity. More advanced methods of shoe making offer still greater economies. Just as the cement process requires fewer operators than the welt process, the newer injection molding process requires even fewer operators.

These changes have produced a direct effect upon International's use of machinery distributed by United Shoe Machinery corporation (hereinafter referred to as ("United"). International's principal use of machines distributed by United has been in the areas of the lasting, bottoming and finishing operations. Those operations utilize the last fourteen of eighteen machine types listed in a recent communication received by International from the U.S. Department of Justice and changes in process, from welts to cements and injection molding, renders ten of those fourteen machine types, to a degree, unnecessary to shoe manufacture. The eighteen machine types listed in the communication were, as follows:

1. Clicking
2. Eyeletting
3. Cutting Press
4. Pulling Over
5. Lasting
6. Welt Sewing
7. Inseam Trimming
8. Outsole Laying
9. Rough Rounding
10. Outsole Stitching

11. Cement Sole Attaching
12. Littleway Lockstitch
13. McKay Chainstitch
14. Loose Nailing
15. Outsole Leveling
16. Fibre Fastening
17. Heel Attaching
18. Slugging

A majority of these machines are used in the manufacture of shoes by the welt process. International has noticed increased competition in this field. For example, in International's shoe factories producing men's cement shoes all of United's pulling-over machines have been replaced with Astra combination lasters and all of United's toe lasters in those factories have been returned to United.

International is now making 6,000 pairs per day of women's and teens' playshoes in a particular factory by the string-lasted vulcanized process. This manufacturing method, which has been used by International for about three years, uses no machinery distributed by United except clickers and eyletters owned by International; the Desma vulcanizer (a German machine) does all the rest. There is no lasting and no sole attaching in this process.

Similarly International is now using the relatively new injection molding process in two factories and will install the process in a third factory shortly. That process has been utilized by International since 1960 and with it International is now producing 16,000 pairs per day of juveniles', boys' and men's service oxfords and dress shoes. In this method of manufacture all bottoming and finishing operations are rendered unnecessary for the sole is molded on after the upper emerges from the lasting room. In this process no use

is made of thirteen of the eighteen machine types previously listed.

The effect of these changes in International's requirements for machinery has led to returns of substantial numbers of machines to United, including welt machinery, stitchdown machinery, toe lasters of all types, stitchers, heelers and others. A review of International's machinery orders and returns for the past six years shows that in each of those years International has returned more machinery to United than International ordered from United. The figures are, as follows:

	Orders	Returns	Net Returns
1958	248	385	137
1959	312	377	65
1960	192	276	84
1961	334	397	63
1962	201	304	103
1963	21	375	354

(D. Ex. 39, admitted Tr. 609)

* * *

Robert S. Lockridge, President of Craddock-Terry Shoe Corp.:

11. There is now a great deal of competition among machinery manufacturers and distributors to supply equipment for newer processes and operations, to substitute newer operations and machines for those previously in use, to supplant existing methods and machines and to supply new machines for earlier operations, such as pulling over and toe lasting machines, outsole stitchers, sole laying machines, back-part molding machines for assembly and other operations and other types. This competition is growing and in my judgment will continue to grow as technological change

brings new methods and simpler operations. (D. Ex. 40, admitted Tr. 609)

* * *

Julian Samuels, President of Samuel Shoe Co.:

These developments are linked with changes in the machinery used in the factory. Considerable factors in our increased rate of processing shoes have been the installation of fitting room conveyors manufactured by SAKAS of Lancaster, Ohio, and greater efficiency in the lasting room. Our lasting and bottoming operations have gone through various machinery changes in the past few years. For example, we had Compo toe-lasters on trial about two years ago and decided the United PTL-B gave greater productivity and easier training of operators. Despite the good experience we have had with the PTL-B, we are now experimenting with an Albeko automatic toe-laster. We changed some of our Rex Pulling-Over machines about three years ago to a console model which we found more efficient, easier to operate, and a little faster. This new model became available about 8 years ago. We have a new heat setting machine which reduces the amount of time that shoes must spend on the last. About a year ago we installed a Fostoria cement drying machine which dries cement in 8-9 minutes instead of three and a half hours.

We now have four Compo and two United sole presses which do our sole-laying, also laying the flap of the outsole in one operation. Our present tabless breast leaf trimming machines give far greater productivity than when formerly done by hand. Our present automatic sole-buffing machine eliminates presanding, which required hand operations while the shoe was on the last. Seven or eight years ago we installed a Compo sole end splitter (after trying both

Compo and United) in a change required by our tabless method of construction. (D. Ex. 41, admitted Tr. 609)

* * *

Adolph K. Krause, President of Wolverine Shoe & Tanning Company:

6. Our Hush Puppies are pulled over and side lasted in four different ways. In one line we use the Astra (foreign) pulling over and toe lasting machine (cement) and the International Shoe Machine Corporation's cement laster. A second uses the United pulling over and toe lasting machine (cement) and the International cement laster. A third uses the United puller with cement only (no tacks) and the United semi-automatic toe laster. In the fourth line side-lasting by cement is done by hand. Heel seat lasting is presently done with tacks, but one factory is experimenting with cement applied by the United heel seat laster and with back part molding. Sole attaching is done with Compo, Schwabe and United machines, the latter about 40% of the total. We are thinking seriously of eliminating the cement side-lasting machines and substituting hand lasting by cement for the work not done by the pulling and toe lasting or the toe lasting machines. We figure that cement heel seat lasting satisfactory for our shoes will be available in perhaps six months.

8. There have been many changes in the shoe industry since 1955. In many ways there is less reliance on United. Managements are more aware of technological developments and more alert to take advantage of them. Competition is ever keener. As the demand for light footwear has spread, ways of satisfying it have increased. An example is the invasion of what used to be the markets for conventional footwear by fabric upper—rubber bottom shoes, including sneakers. This development has inspired new com-

petition in other forms. Our development of the Hush Puppy was a direct result of this invasion. More shoe machines are available, more people are producing them and there is a wider choice. We try hard to take advantage of this situation. We try to keep in touch with all machine development, both here and abroad. We do this through the National Association of Shoe Manufacturers, the Factory Management Conference and the various shoe machine exhibits. Our factory managers and research man call on European factories, particularly those of our licensees, and keep informed of new things. We have set up our own research and engineering departments and are developing some machines of our own. For example, the operators of present edge trimming machines are the highest priced labor in the plants. We have 49 United edge trimming machines. We have developed an automatic machine for our edge trimming operations which will supplant all of the present machines except one or two in each factory to correct cripples or in case of trouble. We, like our competitors, are continually seeking to reduce costs, especially cost of labor, which is a major factor. Our total employment in the five shoe factories is now 2,350. We manufacture the Hush Puppies on only three lasts for men and two for women, with probably only 20 different patterns. All of our production is for stock and we run two shifts steadily, but are always short of stock. Our in-stock inventory runs upwards of 2,000,000 pairs and turns over upwards of four times per year. By these methods we have steadily brought our labor costs down while piece rates have gone up. (D. Ex. 42, admitted Tr. 609)

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No. 597

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED SHOE MACHINERY CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,

DONALD F. TURNER,
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Department of Justice,
Washington, D.C. 20530.

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We limit ourselves here to responding to only one contention in United's brief—that the district court should not have used United's current revenues to determine that its share of the shoe machinery market was approximately 62 percent, but instead should have relied upon other data which would have produced a lower figure.

The district court found "that United has about three-fifths to two-thirds of the shoe machinery market now * * *" (A. 77). It based this upon United's 62 percent share of the shoe machinery industry total

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revenues (A. 76). Respondent argues, however, that the district court should have relied upon two different measures, under which its market share would be between 48 and 51 percent (A. 80), *viz.* (1) the 1963 percentage of the total number of machines located in shoe factories which had been supplied by United, based on physical count (United Br. 8, 11), and (2) the 1963 percentage of shoe machines shipped which were shipped by United, based on dollar value (United Br. 8, 19–20, 28–30). The district court correctly rejected these criteria as inadequate gauges of market power.

It found not only that the revenue figure was a far more satisfactory index of market share than those proposed by United (A. 76),[1] but also that many other factors confirmed the correctness of the conclusion derived from that measure (A. 77). United—paradoxically for an appellee—challenges these findings as clearly erroneous. But both the record and the court's opinion confirm their correctness. As the district court found, United's suggested indicia would not accurately reflect its share of the entire market (A. 80).

Ordinarily, market share is determined by current sales, which are normally equivalent to gross reve-

[1] Indeed, the district court explicitly stated (A. 76): "The aforesaid revenue percentage of the shoe machinery market is a far more satisfactory index of share of the market than any other suggested. That index is far more illuminating than one based on a mere count of machines in position in shoe factories without distinguishing the machines by type, or value, or yield. It is also more satisfactory than one based on the value of annual shipments, an index which disregards the payment of rentals upon or conversion prices for machines shipped in previous years."

nues. In the shoe machinery industry, however, current sales are only a part of the picture. Most shoe factories lease rather than buy machines because they do not choose to invest substantial capital in expensive machines which cannot be easily disposed of; indeed, many shoemakers could not survive at all without leasing (A. 77–78). Sales, therefore, represent only a fraction of total shoe machinery transactions. The great bulk of United's business consists of new rentals, renewal of leases of rented machines already installed, and the purchase by users of rented machines (conversion sales).

Transactions involving rented machines in place are a particularly important indicium of United's market position because the decree in this case expressly prohibits United from granting an original or renewal lease for more than five years[2] (A. 2). Thus, shoe manufacturers constantly are making decisions about rented machines that directly affect United's business and, consequently, its share of the market. The transactions that result from such decisions are obviously as much a part of the market as factory sales or new leases, and must be taken into account. The yardstick chosen by the district court—current revenues—reflects all of the different types of market transactions. The two criteria advanced by United do not.

The mere counting of United's share of machines in place would not adequately reflect the shoe manu-

[2] In addition, under the decree leased machines may be returned by the lessee before the term has expired on payment of three months' charges plus damage and shipping costs (A. 2–3).

facturers' decisions to buy or rent machines, to renew leases or to convert to ownership. As the district court found, such a count does not distinguish machines by types, value or yield (A. 76); nor does it indicate whether the machines are owned or leased. Moreover, it involves a comparison of devices which vary greatly in value and complexity, thus ignoring differences between the relatively simple, minor machines which are more easily produced by the smaller firms in large numbers, and the higher-priced, major machines, as to which United continues to have a monopoly position.[3] Current shipments are similarly inadequate, since they omit the substantial volume of transactions involving United-owned machines in place, *i.e.*, renewals and conversion sales which are reflected in the revenue figure.[4]

The fact, which United stresses (Br. 33), that a large number of United's machines in place are relatively old does not justify ignoring the substantial volume of leasing transactions not reflected in current sales. Indeed that fact[5] suggests that the shoe ma-

[3] In all but two of the 18 major machine types in place as listed in the district court's original opinion (110 F. Supp. 295, 304–306), United's share in 1963 of each type exceeded 73 percent of the number of such machines, and its share for most of these types was much higher (A. 22).

[4] In 1963 United renewed leases for 3209 machines, as compared with current shipments of 2528 machines (261 machines sold and 2267 machines leased) (Pl. Exh. 74, Tr. 556–557; set out in the Appendix, *infra*, p. 7). In addition, in 1963 United realized approximately $1.8 million on conversion sales (A. 23).

[5] See Def. Exh. 16, set out in the Appendix, *infra*, pp. 7–8, showing that the great bulk of outstanding United machines were shipped during the periods 1933–1941 and 1945–1953.

chinery industry is plagued by that very lack of innovation that so frequently characterizes monopolized industries.[6] This was one of the evils which the 1953 decree was designed to correct. See *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 347.[7]

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[6] The American shoe industry has on several occasions sought tariff or import quota protection for its products because of the rapidly rising sales of foreign shoes in this country. The reason for the rising sales of imports is the lack of technological superiority of American machines as well as lower wage rates paid by the foreign manufacturers. See statement of Alan Goldstein, President of the Plymouth Shoe Co., for the National Footwear Manufacturers Association, at Hearings before the Senate Finance Committee on Import Quotas Legislation, 90th Cong., 1st Sess., p. 424; statement of Harold O. Toor, Treasurer of the National Shoe Manufacturers Association, and representing the New England Shoe & Leather Association and the St. Louis Manufacturers Association, Hearings before the Senate Finance Committee on the Trade Expansion Act of 1962, 90th Cong., 1st Sess., Part 2, pp. 856, 860, 871; statement of Senator Edmund S. Muskie of Maine at the 1967 Import Quotas Hearings, *supra*, pp. 411, 412; see also statement by Abe Feinglass on behalf of the Fur and Leather Department, Amalgamated Meatcutters and Butcher Workmen (AFL–CIO), at the Import Quotas Hearings, *supra*, pp. 447–448.

[7] See also Peck, *Inventions in the Postwar American Aluminum Industry*, in *The Rate and Direction of Inventive Activity* (National Bureau of Economic Research, 1962) 279, 294–295. Peck's study showed—after comparing the innovative performance of the American aluminum industry prior to the government's antitrust action, when Alcoa had a monopoly, with that after the creation of several additional competitors—that innovation in that industry significantly improved.

CONCLUSION

For the reasons stated in our principal brief and in this reply brief, the order of the district court should be set aside and the case remanded for the consideration of further relief to restore effective competition in the shoe machinery market.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

MARCH 1968.

APPENDIX

PLAINTIFF'S EXHIBIT 74

United Shoe Machinery Corporation—Shoe machinery activity,[1] domestic operations, annually,[2] 1953–64

	Leased shoe machines					Number of new shoe machines sold
	Number outstanding at year-end	Number returned [3]	Number shipped	Number of leases renewed	Number converted to sale	
1953	103,553	N.A.	N.A.	N.A.	0	N.A.
1954	101,222	N.A.	N.A.	N.A.	0	N.A.
1955	75,206	9,362	3,999	7,702	20,253	254
1956	64,528	6,369	3,826	2,358	8,022	522
1957	56,890	5,711	3,728	1,945	5,474	425
1958	50,016	5,777	3,868	1,348	4,842	310
1959	45,331	4,270	3,702	1,360	4,140	305
1960	38,968	6,322	4,382	4,941	4,432	218
1961	35,007	5,096	3,746	3,232	2,677	382
1962	31,616	4,498	3,032	3,311	2,086	205
1963	28,574	4,052	2,267	3,209	1,385	261
1964	26,718	3,704	2,357	2,419	678	277

[1] Data pertain, with the exception of the number of leased shoe machines outstanding at year-end and number of leased shoe machines returned, to shoe machines in shoe factories. The number of leased shoe machines outstanding at year-end and number of leased shoe machines returned include shoe machines in both shoe and nonshoe factories; shoe machines in nonshoe factories are agreed to vary between 5 and 10 percent of total.

[2] Data pertain to fiscal years ended on or about February 28 of the subsequent year.

[3] Includes returns from current and all previous years' shipments.

N.A.—Not available.

DEFENDANT'S EXHIBIT 16

Age of machines of USMC manufacture in USMC 1963 sample

Shipping year	Age in 1963	Leased machines	Owned machines	Total machines
1896	67	----	1	1
1897	66	----	3	3
1899	64	----	1	1
1900	63	----	2	2
1901	62	----	8	8
1902	61	----	6	6
1903	60	----	2	2
1904	59	----	8	8
1905	58	----	13	13
1906	57	----	16	16
1907	56	----	14	14
1908	55	----	15	15
1909	54	----	20	20
1910	53	----	36	31

Age of machines of USMC manufacture in USMC 1963 sample—Continued

Shipping year	Age in 1963	Leased machines	Owned machines	Total machines
1911	52		35	35
1912	51		20	20
1913	50		18	18
1914	49		15	15
1915	48		24	24
1916	47		42	42
1917	46		36	36
1918	45		38	38
1919	44		41	41
1920	43		44	44
1921	42		26	26
1922	41		41	41
1923	40		74	74
1924	39		71	71
1925	38		53	53
1926	37		32	32
1927	36		24	24
1928	35		43	43
1929	34		55	55
1930	33		28	28
1931	32		66	66
1932	31		44	44
1933	30	4	128	132
1934	29	1	137	138
1935	28	1	93	94
1936	27	1	162	163
1937	26	1	157	158
1938	25	3	125	128
1939	24	4	165	169
1940	23	2	123	125
1941	22	3	262	265
1942	21		48	48
1943	20		17	17
1944	19		23	23
1945	18	9	160	169
1946	17	1	175	176
1947	16	17	213	230
1948	15	23	188	211
1949	14	32	209	241
1950	13	60	213	273
1951	12	39	135	174
1952	11	101	171	272
1953	10	170	61	231
1954	9	142	68	210
1955	8	58	23	81
1956	7	51	32	83
1957	6	118	42	160
1958	5	181	15	196
1959	4	141	8	149
1960	3	162	15	177
1961	2	195	37	232
1962	1	244	7	251
1963	0	46	2	48
Total		1,810	4,169	5,979

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT OF THE UNITED STATES

No. 597.—October Term, 1967.

United States, Appellant, v. United Shoe Machinery Corporation.	On Appeal From the United States District Court for the District of Massachusetts.

[May 20, 1968.]

Mr. Justice Fortas delivered the opinion of the Court.

In 1953, in a civil suit brought by the United States, the District Court for the District of Massachusetts held that respondent had violated § 2 of the Sherman Anti-trust Act by monopolizing the manufacture of shoe machinery. The court found that "(1) defendant has, and exercises, such overwhelming strength in the shoe machinery market that it controls that market, (2) this strength excludes some potential, and limits some actual, competition, and (3) this strength is not attributable solely to defendant's ability, economies of scale, research, natural advantages, and adaptation to inevitable economic laws." *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 343 (1953). The court did not order the relief requested by the Government—that respondent be dissolved into three separate shoe machinery manufacturing companies. Rather, the court imposed a variety of restrictions and conditions designed "to recreate a competitive market."[1] Respondent ap-

[1] Some of the major provisions of the decree were as follows: United was enjoined from further monopolization; it was ordered to offer for sale all types of machines (previously only leased) at "such terms . . . as do not make it substantially more advantageous for a shoe factory to lease rather than to buy a machine"; if United continued leasing it was required to lease for no more than five-year terms under certain specified conditions; it was not to refuse a prospective customer's request to lease or buy a machine

pealed to this Court, which affirmed the decision of the District Court. *United Shoe Machinery Corp.* v. *United States*, 347 U. S. 521 (1954).

The decree of the District Court, entered on February 18, 1953, and subsequently modified on July 12, and September 17, 1954, provided in paragraph 18 that:

> "On [January 1, 1965] both parties shall report to this court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market." 110 F. Supp., at 354.

Pursuant to this provision, the Government reported to the District Court on January 1, 1965, that respondent continued to dominate the shoe machinery market, that workable competition had not been established in that market, and that additional relief was accordingly necessary. The Government asked that respondent be required to submit to the Court a plan, pursuant to which United's business would be reconstituted so as to form two fully competing companies in the shoe machinery market. It also requested "such other and further relief as may be necessary to establish workable competition in the shoe machinery market."

"except for good cause"; it was to submit a plan for disposing of certain sectors of its business; it was to grant to any applicant, except a deliberate infringer, a nonexclusive license under any or all patents held by it on reasonable nondiscriminatory royalty terms; it was not to acquire any patents or patent applications except those acquired by reason of bona fide employment of the inventor, nor was it to acquire patents or patent applications under exclusive license; it was not to acquire any second-hand shoe machinery or any shoe machinery manufacturer or a manufacturer or distributor of supplies for shoe factories.

The District Court, after a hearing, denied the Government's petition.[2] It held that under *United States* v. *Swift & Co.*, 286 U. S. 106 (1932), its power to modify the original decree was limited to cases involving "(1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen circumstances." *United States* v. *United Shoe Machinery Corp.*, 266 F. Supp. 328, 330, 334 (1967). Analyzing its 1953 decree, as amended, the court said that the object of the decree was "not to restore workable competition but to move toward establishing it," and that "the 1953 decree has operated in the manner and with the effect intended. It has put in motion forces which, aided by new technology, have eroded United's power and already disrupted much of the effect of the monopoly." 266 F. Supp., at 330, 334. Accordingly, in view of the stringent requirements of *Swift* as the court construed that decision, the District Court denied the Government's petition.

From this decision the Government appealed to this Court. We noted probable jurisdiction. 389 U. S. 967 (1967). We reverse.

I.

The District Court misconceived the thrust of this Court's decision in *Swift*. That case in no way restricts the District Court's power to grant the relief requested by the Government in the present case. In *Swift*, a consent decree had been entered in 1920 ordering a measure of divestiture by and imposing a variety of restraints upon the defendant meat packers. In 1930, after various unsuccessful attempts to secure modification or vacation of the decree, the packers filed a petition "to modify the consent decree and to adapt its restraints to the

[2] A petition by respondent, seeking to be relieved of certain restrictions contained in the original decree, was similarly denied. The judgment in this regard is not before us, since respondent has not appealed to this Court

needs of a new day," as Justice Cardozo phrased it. 286 U. S., at 113. The lower court granted a measure of relief and the United States appealed. This Court reversed. It emphasized the power of a court of equity "to modify an injunction in adaptation to changed conditions though it was entered by consent." *Id.*, at 114. The question, it held, is "whether enough has been shown to justify its exercise." *Id.*, at 115. After reviewing the evidence, the Court concluded that the danger of monopoly and of the elimination of competition which led to the initial government complaint and the decree had not been removed and that, although in some respects the decree had been effectuated, there was still a danger of unlawful restraints of trade. The Court's language, quoted and relied on by the trial court here, to the effect that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change" the decree, must, of course, be read in light of this context. *Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices) have not been fully achieved.

The present case is the obverse of the situation in *Swift* if the Government's allegations are proved. Here, the Government claims that the provisions of the decree were specifically designed to achieve the establishment of "workable competition" by various means and that the decree has failed to accomplish this result. Because time and experience have demonstrated this fact, according to the Government, it seeks modification of the decree. Nothing in *Swift* precludes this. In *Swift*, the defendants sought relief not to achieve the purposes of the provisions of the decree, but to escape their impact. Accordingly, we conclude that the District

Court erred in denying the Government's petition "on the authority of *United States* v. *Swift & Co.*, 286 U. S. 106, 119." 266 F. Supp., at 334.

II.

Decision as to the Government's petition to modify the decree in the present case must be based upon the specific facts and circumstances that are presented. In urging affirmance of the 1953 decision, the Government advised this Court that, in framing the decree, the District Court had "proceeded on the premise that relatively mild remedies should be tried as a first resort, and that the possibility of more drastic measures should be held in abeyance." Brief of the United States, No. 394, 1953 Term, p. 155. Paragraph 18 of the decree appeared to be in confirmation of this statement since it expressly required a report after 10 years of experience under the decree and contemplated that petitions for modification might be filed "in view of [the decree's] effect in establishing workable competition." Paragraph 18 then specifically provided that any such petition would have to be accompanied by "affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market." [3]

These specifications were peculiarly apt because this is a monopoly case under § 2 of the Sherman Act and because the decree was shaped in response to findings of monopolization of the shoe machinery market. That the purpose of the 1953 decree was to eliminate this un-

[3] In paragraph 23 of the original decree jurisdiction was expressly retained "for the purpose of enabling either of the parties to apply to this Court at any time for such further orders and directions as may be appropriate for the correction, construction, or carrying out of this Decree, and to set aside the Decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act." 110 F. Supp., at 354.

lawful market domination was made clear beyond question by the District Court's statement at the beginning of the section of its opinion dealing with relief. This read as follows:

> "Where a defendant has monopolized commerce in violation of § 2, the principal objects of the decrees are to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market." 110 F. Supp., at 346–347.

It is of course established that, in a § 2 case, upon appropriate findings of violation, it is the duty of the court to prescribe relief which will terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future. See, *e. g., United States* v. *Grinnell,* 384 U. S. 563, 577 (1966); *Schine Theatres* v. *United States,* 334 U. S. 110, 128–129 (1948). The trial court is charged with inescapable responsibility to achieve this objective, although it may, if circumstances warrant, accept a formula for achieving the result by means less drastic than immediate dissolution or divestiture. The decree in the present case was carefully devised within the limits of this principle. Measures short of divestiture were prescribed with provisions for review and possible revision after 10 years.[4]

The District Court has now denied the Government's petition for modification of the decree on the ground that the decree is "still working at its long-range task of freeing the market from all consequences of United's

[4] In rejecting the suggestion that United be forbidden to lease on any terms, the District Court stated specifically that it "agrees that it would be undesirable, at least until milder remedies have been tried, to direct United to abolish leasing forthwith." 110 F. Supp., at 349.

monopolization and keeping the door wide open for the arrival of an adequately provided challenger." 266 F. Supp., at 334. According to the court, this was the intended effect of the decree.

If the decree had not contained paragraph 18—if it had been silent as to the time for submitting reports and, if necessary, petitions for modification—and if after 10 years it were shown that the decree had not achieved the adequate relief to which the Government is entitled in a § 2 case, it would have been the duty of the court to modify the decree so as to assure the complete extirpation of the illegal monopoly. The court's power to do this is clear. See, *e. g., United States* v. *Swift & Co.*, 286 U. S. 106 (1932); *Chrysler Corp.* v. *United States*, 316 U. S. 556 (1942). Its duty is implicit in the findings of violation of § 2 and in the decisions of this Court as to the type of remedy which must be prescribed.

We find nothing in the 1953 decree, as amended, or in the District Court's opinion relating thereto which presents an obstacle or embarrassment to the application of this principle in the present case. If the decree has not, after 10 years, achieved its "principal objects," namely, "to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market"—the time has come to prescribe other, and if necessary more definitive, means to achieve the result. A decade is enough.[5] Even if we should assume that paragraph 18, as the District Court

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[5] We emphasize that there is no issue here regarding the timing of the Government's petition for modification. No claim is made that the Government has petitioned for modification before the running of a reasonable period during which the effects of the original decree have become clear. Moreover, the Government may claim, persuasively, that paragraph 18 of the original decree specifically contemplated that the Government would petition when it did.

now states, had only the limited purpose of calling for a 10-year report as to whether the decree was "gradually eroding United's 1953 power to monopolize the market," its specific provisions did not exhaust the District Court's power. Relief in a Sherman Act case "should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act." *United States* v. *Grinnell,* 384 U. S. 563, 577 (1966). See also *United States* v. *United States Gypsum Co.,* 340 U. S. 76, 88–90 (1950); *United States* v. *E. I. du Pont de Nemours & Co.,* 366 U. S. 316, 326 (1961). The District Court should proceed to determine whether the relief in this case has met the standards which this Court has prescribed. If not, the District Court should modify the decree so as to achieve the required result with all appropriate expedition.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.